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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 27

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

vs.

THE UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

No. 28

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER OF THE STEAM TANKER JOHN WORTHINGTON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1950.

CERTIORARI GRANTED JUNE 5, 1950.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, owner of U. S. Ship YMS-12

against

STANDARD OIL CO. OF N. J.

DOCKET ENTRIES

June 5, 1944. Filed Libel.

Dec. 4, 1945. Filed Notice of Appearance of Standard Oil Co. of N. J.

Jan. 8, 1946. Filed answer of respondent.

Oct. 8, 1948. Consolidated with A 153203 for trial purposes. Trial Begun. Decision Reserved before Ryan *J.*

Dec. 3, 1948. Filed stipulation between proctors (Also in A 153-203)

Dec. 3, 1948. Filed Opinion #17,826 Ryan *J.* U. S. A. to indemnify Standard Oil against all the costs of defense of the suit brought by it, this amount will be determined by usual reference etc.—Ryan *J.*

Dec. 3, 1948. Filed Stipulation re "Exhibit 3" attached (also in A 153-203)

[fol. 2] Dec. 16, 1948. Filed Order consolidating A 153-203 with this case for purpose of this decree & for appeal. U. S. A. to recover one-half of its damages arising from the collision from Stnd. Oil Co. of New Jersey and Stnd. Oil Co. of New Jersey entitled to recover that identical amount etc., reference to Edward Ryan as Comm'r to ascertain damages sustained by Stnd. Oil Co. of New Jersey etc., Ryan *J.*

Dec. 28, 1948. Filed Notice of Appeal.

Dec. 30, 1948. Filed Petition & order allowing appeal. Bondy *J.* (Also in A 153-203)

May 19, 1949. Filed Assignments of Errors (Also in A 153-203)

May 20, 1949. Filed U. S. C. A. extending time to file record & brief to 7/15/49

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

STANDARD OIL COMPANY OF NEW JERSEY, as owner of the steam tanker JOHN WORTHINGTON

vs.

UNITED STATES OF AMERICA

DOCKET ENTRIES

Dec. 12, 1947. Filed Libel & Stip. for costs

Mar. 10, 1948. Filed Notice of Appearance

Oct. 8, 1948. Consolidated with A 131-151 for purposes of trial. Trial begun. Decision reserved before Ryan *J.*

Oct. 23, 1948. Filed Answer.

Dec. 3, 1948. Filed stipulation between proctors (Filed in A 131-151)

Dec. 3, 1948. Filed Opinion #17826 Ryan *J.* (See opinion) (Filed in A 131-151)

Dec. 3, 1948. Filed Stipulation re: Exhibit "3" attached thereto (Filed in A 131-151)

Dec. 16, 1948. Filed order of consolidation for decree & appeal. Reference to Edward Ryan as Comm'r etc.—(See entry in A 131-151) (Filed in A 131-151)

Dec. 28, 1948. Filed Notice of Appeal.

Dec. 30, 1948. Filed Petition & Order allowing appeal. Bondy, *J.* (Filed in A 131-151) U. S. Atty.

May 19, 1949. Filed Assignments of Error (filed in A 131-151)

[fol. 4] IN UNITED STATES DISTRICT COURT

LIBEL OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court for the Southern District of New York:

A. 131-151

The libel of the United States of America, owner of the United States Ship YMS-12, against the Standard Oil Company of New Jersey, in a cause of collision,

civil and maritime, alleges upon information and belief as follows:

First: At all the times hereinafter mentioned the libelant was and still is a corporation sovereign and the owner of the United States Ship YMS-12, a minesweeper, which, up to the time of the collision hereinafter mentioned, was tight, staunch, strong and in all respects seaworthy.

Second: The respondent, at all the times hereinafter mentioned, was, and still is a corporation organized and existing under and by virtue of the laws of the state of New Jersey, with an office and place of business at No. 30 Rockefeller Plaza, Borough of Manhattan, New York City, in the Southern District of New York, and at all material times was the owner and operator of the steamship John Worthington.

Third: On December 16, 1942, a collision occurred between the United States Ship YMS-12 and the steamship John Worthington. The facts and circumstances surrounding the said collision are as follows:

Between 5:00 and 6:00 on the morning of December 16, 1942, the YMS-12 was part of a formation of three mine-[fol. 5] sweepers which were engaged in minesweeping in a buoyed channel in the approaches to New York Harbor. The USS YMS-105 was the guide ship of the formation, which was proceeding on the easterly side of the swept channel, keeping the mid-channel buoys on the port hand. The YMS-12 was stationed several hundred yards on the starboard beam of the YMS-105 and the third vessel in the formation, the USS AMC-95, was echelon to the right of the guide ship, in a position approximately a half mile astern of and midway between the YMS-105 and the YMS-12. The three vessels were proceeding in a northerly direction, at a speed of approximately 6½ or 7 knots, and each was displaying three all around green lights, indicating that it was engaged in minesweeping operations. The sea was moderate, the night was dark and misty and the visibility was fair to good. The YMS-12 was maintaining a proper and diligent lookout.

Suddenly the range lights and starboard running light of a large vessel, which subsequently proved to be the John Worthington, appeared on the port bow of the YMS-12,

several hundred yards ahead of the YMS-105, on a course crossing the swept channel from west to east and crossing the course of the YMS-12 from port to starboard. The YMS-105 also sighted the John Worthington and promptly signalled her by flashing light to steer clear. The John Worthington receipted for the message. Immediately after she was sighted by the YMS-12, the John Worthington's range lights appeared to be closing as though she were swinging to her starboard in order to pass between the YMS-105 and the YMS-12. The YMS-12 thereupon turned hard right and increased the speed of her port engine from about 900 to about 1200 revolutions, in an endeavor to swing the YMS-12 out of the path of the John Worthington, [fol. 6] which was observed to be bearing down upon the YMS-12. Before this maneuver could be successfully completed, the John Worthington's bow collided with the YMS-12 at a point aft of amidships, on the port side, causing very severe damage. At the time of the collision, the YMS-12 had changed course about 3 points to the starboard of her original course and was still swinging to starboard. No signals were heard from the John Worthington.

After the collision, the John Worthington backed off and continued on her course, failing to stand by. Efforts were made to keep the YMS-12 afloat, but without success. A heavy list to port developed and she was eventually beached off Fort Wadsworth, from which position she was later raised and towed into drydock.

Fourth: The aforesaid collision and the damage resulting therefrom were not caused or contributed to by any fault, negligence or want of care on the part of the libelant, its agents, servants and employees, or of the YMS-12, her officers and crew, but were due solely to the fault, negligence and want of care of the respondent, its agents, servants and employees, and of the steamship John Worthington in the following respects, among others which will be pointed out at the trial:

1. The steamship John Worthington was not in charge of competent persons.

2. Those in charge of her were inattentive to their duties.

3. She failed to maintain a proper and diligent lookout.

4. She was proceeding on her own port side of the center line of the buoyed channel, and failed to keep to that side of [fol. 7] the center line of said buoyed channel which lay on her starboard side.

5. She failed to keep out of the way of the formation of minesweepers engaged in sweeping the channel, after being warned to steer clear by the guide ship.

6. She attempted to pass through the formation of minesweepers engaged in sweeping the channel.

7. She failed to keep out of the way of the YMS-12.

8. She attempted to cross ahead of the YMS-12.

9. She failed to sound proper or any whistle signals.

10. She was proceeding at an immoderate speed under the existing circumstances.

11. She failed to maneuver with helm and engines to avoid collision or to do so in time.

12. She failed to stand by and render assistance to the YMS-12 after the collision.

Fourth: As a result of the collision the libelant has sustained damages by way of the cost of repairs, detention and incidental expenses, amounting in all to the approximate sum of $150,000, as nearly as the same can now be determined, no part of which sum has been paid, although duly demanded.

Fifth: All and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

[fol. 8] Wherefore, the libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the respondent, Standard Oil Company of New Jersey citing it to appear and answer on oath the matters and things aforesaid; that this Honorable Court may adjudge and decree that the respondent, Standard Oil Company of New Jersey, pay to the libelant its damages as aforesaid, with interest and costs; and that the Court will

grant to the libelant such other and further relief as the justice of the cause may require.

James B. M. McNally, United States Attorney, Proctor for Libelant, 45 Broadway, New York City.

(Duly verified April 24, 1944.)

[fol. 9] IN UNITED STATES DISTRICT COURT

ANSWER OF STANDARD OIL COMPANY OF NEW JERSEY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

A. 131-151

The answer of Standard Oil Company of New Jersey to the libel of the United States of America as owner of the United States Ship Y. M. S.-12 in a cause of collision, civil and maritime, alleges on information and belief as follows:

First: Admits that at all times mentioned in the libel libelant was and still is a corporation soverign. Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the First article of the libel.

Second: Admits that respondent at all times mentioned in the libel was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware with an office and place of business at 26 Broadway, Borough of Manhattan, New York City, in the Southern District of New York and at all material times was the owner and operator of the steam tanker John Worthington.

Third: Admits that betwen 5 and 6 A. M. on December 16, 1942 the sea in the vicinity of the swept channel was moderate, the night dark and misty and the visibility fair to good. Denies that the Y. M. S.-12, the Y. M. S.-105 and the U. S. S. AMC-95 were proceeding in a northerly direc-
[fol. 10] tion; that each was displaying three all-around green lights; that the Y. M. S.-12 was maintaining a proper and diligent lookout; that suddenly the range lights and

starboard running light of a large vessel which subsequently proved to be the John Worthington appeared several hundred yards ahead of the Y. M. S.-105 on a course crossing the swept channel from west to east and crossing the course of the Y. M. S.-12 from port to starboard; that the Y. M. S.-105 in the position alleged signalled the John Worthington by flashing light to keep clear and that the latter receipted for the message; that the John Worthington's range lights appeared to be closing as though she were swinging to her starboard in order to pass between the Y. M. S.-105 and the Y. M. S.-12; that after alleged collision the John Worthington backed off and continued on her course, failing to stand by. Denies that it has any knowledge or information sufficient to form a belief as to each and all of the other matters alleged in the Third article of the libel.

Fourth: Denies each and all of the matters alleged in the Fourth article of the libel including each and all of the separate allegations of fault on the part of the John Worthington therein contained.

Fifth: Denies that it has any knowledge or information sufficient to form a belief as to each and all of the matters alleged in the second article marked Fourth of the libel.

Sixth: Admits the jurisdiction of the United States and of this Honorable Court. Denies each and all of the other matters alleged in the Fifth article of the libel.

[fol. 11] Seventh: Further answering, respondent alleges as follows: On December 16, 1942 at about 5:50 A. M. the John Worthington in ballast was proceeding from Stapleton anchorage, New York, to sea in convoy. The wind was northeast, about Force 5. It was dark, snowing lightly but visibility was good, about 3 miles. The convoy was following the swept channel below Ambrose Light Vessel in a single line, heading about southeast, keeping the buoys of the swept channel close on her port hand. The Chief Officer was on watch, there was a lookout on the forecastle head and a competent wheelsman at the steering wheel. The John Worthington was maintaining her station in said convoy line of ships, showing dim navigation lights, in accordance with orders. The lights of the other vessels in the convoy were visible in line ahead and astern. While so proceeding the John Worthington came upon three small

naval vessels, moving on a course about parallel, about a quarter of a mile off to starboard. One was slightly abaft the John Worthington's beam; one was about opposite the John Worthington's starboard bow and one was some distance ahead, bearing about a point and a half on the starboard bow. Said naval vessels were not showing any navigation lights, but ordinary lights were seen on their decks. The naval vessel about abeam of the John Worthington, signalled by blinker to keep clear. The John Worthington held to her station in the line of ships and proceeded at the convoy speed, gradually overhauling the naval vessel above mentioned as bearing a point and a half on the starboard bow. Both the John Worthington and said naval vessel appeared to be proceeding on courses about parallel. If said naval vessel had held her course, the Worthington would have passed clear at a distance of about a quarter of a mile.

[fol. 12] Suddenly said naval vessel was observed to change course to her left, bringing her on a converging course with that of the convoy course followed by the John Worthington. The John Worthington thereupon sounded two whistles but received no reply from the naval vessel which kept closing with the John Worthington. Thereupon the Chief Officer of the John Worthington ordered the helm 10° left in order to give the naval vessel plenty of room. A few seconds later the naval vessel was observed to swing hard left and close fast with the course of the Worthington. The Worthington's helm was then ordered hard left. The naval vessel then increased her swing to the left toward the bow of the John Worthington. Seeing that it was impossible to avoid collision by helm movements, the Chief Officer ordered the engines full astern. The naval vessel continued swinging hard left and approached close under the starboard bow of the John Worthington, whose engines were in reverse and which was swinging to the left under a hard left rudder. At about 6 A. M., the naval vessel then being close under the bow of the John Worthington, the Chief Officer ordered the engines of the John Worthington stopped and went forward to the forecastle head. When he got there he found the naval vessel about 20 feet off the bow of the John Worthington, lying about parallel, all her lights then being extinguished, both ships moving slowly ahead through the water. The Chief Officer hailed the naval vessel, and was requested by some one on the

naval vessel to stand by for a minute. The John Worthington stood by as requested, but shortly thereafter the naval vessel started her motors, turned away to the right and disappeared in the darkness. At 6:14 A. M. the John Worth-
[fol. 13] ington's engines were ordered full ahead and she resumed her voyage in convoy. Subsequent examination of the John Worthington did not disclose any damage or evidence of contact with any other vessel.

Eighth: Respondent has not sufficient knowledge or information to form a belief as to whether or not a collision actually occurred between said naval vessel and the John Worthington nor as to whether or not said naval vessel was the Y.M.S.-12. But if any collision did occur with said naval vessel, said collision and any damage resulting therefrom were not caused or contributed to by any fault, negligence or want of care on the part of respondent, its agents, servants and employees, or of the John Worthington or those in charge of her, but were due solely to fault and negligence on the part of libelant, its agents, servants and employees, and of said naval vessel and those in charge of her, in the following respects, among others:

1. Said naval vessel was not in charge of competent persons.

2. Those in charge of said naval vessel were inattentive to their duties.

3. Those in charge of said naval vessel failed to maintain a proper and diligent lookout.

4. Said naval vessel failed to maintain her course and speed after receiving the John Worthington's passing signal.

5. Said naval vessel executed a left turn which brought her on a course intercepting the convoy course of the John Worthington.

[fol. 14] 6. Said naval vessel attempted to cross ahead of the John Worthington under circumstances which indicated that such course would inevitably lead to collision.

7. Said naval vessel failed to sound any whistle signals.

8. Said naval vessel failed to take proper precautions to avoid collision after danger was apparent.

Ninth: Further answering and as a separate defense, respondent alleges that at all times mentioned in the libel, War Shipping Administration was and still is an agency of libelant created by the President's Executive Order of February 7, 1942, No. 9054 and at all such times Emory S. Land was the Administrator thereof.

Tenth: On or about April 20, 1942, during a period of national emergency declared by proclamation of the President, the Administrator, War Shipping Administration, acting for libelant under authority of the Merchant Marine Act, 1936, as amended, and the President's Executive Order of February 7, 1942, No. 9054, requisitioned the use of the John Worthington on a time charter basis, effective on taking delivery thereof. Said vessel was delivered to and taken by libelant at the port of St. Georges, Bermuda on April 22, 1942. Continuously thereafter and at all times mentioned in the libel, said vessel was employed by and operated for libelant in accordance with the terms and conditions of said requisition time charter.

Eleventh: Thereafter libelant and respondent, the former represented by the Administrator, War Shipping Ad-
[fol. 15] ministration, acting under the authority of said Act and said Executive Order, agreed upon and executed a "Requisition Time Charter" for the use of said vessel from the time of said taking (Warshipoiltime Form No. 102, 5/22/42) dated as of April 20, 1942, and designated as Contract No. W.S.A. 1548-R. Said charter was in full force and effect at all times mentioned in the libel.

Twelfth: Part II, Clause 20 of said charter, pertaining to insurance, provided in part as follows:

> "CLAUSE 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto; * * *"

Thirteenth: Pursuant to the provisions of said charter, respondent elected war risk insurance valuation Option No. I providing for a valuation of $935,625.00.

Fourteenth: Thereafter, in consideration of the mutual covenants and agreements contained in said charter and pursuant to libelant's obligations thereunder, War Shipping Administration, acting by and through the Director of War Time Insurance and for said Administrator and for said libelant, under authority of said Executive Order and Title II of said Act, executed and delivered to respondent, as the [fol. 16] assured, its War Risks Binder No. R.C. 401 dated July 23, 1942, whereby it insured respondent and caused respondent to be insured against war risks only on the hull of said vessel, from the time of delivery of said vessel to War Shipping Administration under said charter, to the termination of said charter. A true copy of said Binder with Endorsement No. 1 attached is annexed hereto as Schedule "A" and made part hereof.

Fifteenth: Pursuant to libelant's obligation under said charter and said binder, and effective from the time of delivery, as aforesaid, said Administrator also caused said vessel and all the risks listed in said Binder to be entered, carried and insured in the "Marine and War-Risk Insurance Fund" appropriated by Congress and maintained in the Treasury of the United States for the use of said Administrator in carrying out the provisions of Sections 221-229 (Subtitle-Insurance) of said act; and, as required by said charter and said binder, said Administrator paid the premiums for said insurance by depositing certain sums to the credit of said Marine and War-Risk Insurance Fund, as premiums for said insurance.

Sixteenth: Said war risks binder R. C. No. 401 contained, among others, the following provisions:

> "3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. No claim for loss of life or personal injury or from other causes shall be recoverable hereunder unless in accordance with the terms and conditions of the standard form of policy as prescribed by the War Shipping Administration."

* * * * * * *

[fol. 17] Endorsement No. 1 dated July 23, 1942 attached to said War Risk Binder, contained, among others, the following provisions:

"2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto."

Seventeenth: The full form of standard marine and war risk policy of War Shipping Administration in effect at the time of issuance of said Binder and at all times mentioned in the libel, contained, among others, the following provisions:

"By This Policy of Insurance Does, in accordance with applicable provisions of law and subject to all limitations thereof, make insurance and cause to be insured, lost or not lost:

.....

For Account of .....
but subject to the provisions of this Policy with respect to change of ownership.

* * * * * * *

Beginning the Adventure

Upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment [fol. 18] may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever and wheresoever, under steam, motor power, or sail; * * *

* * * * * * *

Full Collision

And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence

thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur or be compelled to pay; * * *

* * * * * * *

[fol. 19] F. C. & S. Clause

Nothwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warrant only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

* * * * * * *

War Risk Clauses

Form No. 7-A.

Endorsement to be attached to and be made a part of Policy No. —

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

[fol. 20] This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not, and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding arrest, restraint, or detainment under customs or quarantine regulations, and similar arrests, restraints, or detainments not arising from actual or impending hostilities or sanctions.

* * * * * * *"

Eighteenth: In the event that respondent or the John Worthington is liable for any damage to United States Ship Y. M. S.-12 by reason of collision as alleged in the libel or otherwise, which respondent denies, said liability of respondent or of the John Worthington arises from, is due solely to, or is the consequence of, one or more of the adventures and perils covered by said War Risk Binder R. C. No. 401 and the war risk clauses attached to said full form of standard marine and war risk policy in effect at all times mentioned in the libel, and libelant insured respondent against any and all liability or loss with respect thereto.

Nineteenth: Respondent was not insured against such liability or loss by any policy or contract of insurance other

[fol. 21] than the insurance provided by libelant as aforesaid. Respondent is the person entitled to the payments due thereunder.

Twentieth: On January 12, 1943 prior to survey of the Y. M. S.-12, respondent gave written notice to libelant through War Shipping Administration, Division of War Time Insurance, of said alleged collision. On December 7, 1945 respondent notified libelant through War Shipping Administration, Division of War Time Insurance, that respondent would look to libelant for full indemnity as to any and all liability for damages sustained by the Y. M. S.-12 or by the United States by reason of said alleged collision, together with all costs and expenses incurred by respondent in the defense of this action.

Twenty-first: Respondent has duly performed each and all of the terms and conditions of said charter and of said contract of insurance on its part to be performed.

Twenty-second: All and singular the premises are true.

Wherefore respondent prays that libelant be directed to answer by its proper officer, in writing and under oath, the interrogatories propounded by respondent annexed hereto; that the libel herein be dismissed with costs; and that respondent may have such other and further relief as may be just.

Kirlin Campbell Hickox & Keating, Proctors for Respondent.

(Duly verified January 2, 1946.)

[fol. 22] Interrogatories Propounded by Respondent to Be Answered by Libelant by Its Prior Officer in Writing and Under Oath

1. State the following in detail:

(a) Names and numbers of all ships in the convoy which was proceeding to sea in the swept channel below Ambrose Lightship at about 6:50 A. M. on December 16, 1942;

(b) Number of the John Worthington in said convoy;

(c) Number of the John Worthington in the order of the ships proceeding in single line in said swept channel;

(d) Name of the Commodore of said convoy;

(e) Name and number of the vessel which carried the Commodore of said convoy;

(f) Number of the vessel which carried the Commodore of said convoy in the order of the ships proceeding in single line in said swept channel.

2. Annex to your answers to these interrogatories a chart or diagram showing the following particulars of said swept channel:

1. Exact position of buoy marking north end of said swept channel;

[fol. 23] 2. Exact position of buoy marking south end of said swept channel;

3. Width of said swept channel throughout its entire length;

4. Number and exact location of all buoys marking said swept channel;

5. Exact position at which it is claimed that the collision described in the libel occurred.

Kirlin Campbell Hickox & Keating, Proctors for Respondent.

[fol. 24] SCHEDULE "A" TO ANSWER

R. C. No. 401

War Risks Binder, Covering Vessels, Requisitioned by the War Shipping Administration, Division of Wartime Insurance, Washington, D. C.

The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below:

Assured: Standard Oil Company of New Jersey.

Address: 30 Rockefeller Plaza, New York, New York.

Vessel: John Worthington. Flag: U. S.

From: Time of delivery to War Shipping Administration about April 22, 1942.

To: Termination of charter.

1. Hull

DWT: 12475. Speed: 10.8 Knots. Date Built: 1920. Value: $935,625. Amount: $935,625.

2. Crew Life and Injury

Total Number of Men Insured for Life and Injury: 50 for $5,000 each.

Life or Injury.

Total Amount Insured $250,000.

3. Crew's Effects.

Total Amount Insured $18,000.

[fol. 25] 4. Internment Wages and Bonuses based on Annual Payroll* $200,000.

5. War P. and I. Including Repatriation $1,497,000.

6. Consumable Stores, Slop Chests, and Leased Equipment $30,000.

7. Master's cash $5,000.

Date: July 23, 1942.

For: Binder approved by: Director of Wartime Insurance (S.) Robert Doyle.

Special Conditions and Warranties

Worldwide Trading Limits.

* Internment coverage without limitation in accordance with applicable decisions of Maritime War Emergency Board.

Premium to be paid by War Shipping Administration.

Any variation in amounts of coverage required in items two, three, four, six and seven above are held covered automatically: Provided, that any variation in excess of twenty five percent be reported as soon as practicable to the War Shipping Administration. In no event shall the liability of the War Shippping Administration exceed the actual amounts at risks in items two, three, six and seven.

[fol. 26] Schedule A

It is warranted that

1. No War Risk Insurance in excess of the value as shown hereon, whether for Hull, Machinery, Disbursements, or other similar interests however described, exists or will be placed during the currency of this insurance, unless the War Shipping Administration is so notified.

2. The valuation set forth herein is for the purposes of said insurance only and is not binding on either the War Shipping Administration or the Assured for any other purpose.

3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. No claim for loss of life or personal injury or from other causes shall be recoverable hereunder unless in accordance with the terms and conditions of the standard form of policy as prescribed by the War Shipping Administration.

Endorsement No. 1 to be attached to Binder No. R. C. 401 Issued Standard Oil Company of New Jersey by the War Shipping Administration.

It is warranted that

1. The deadweight tonnage, speed and refrigerated cargo capacity as set forth in this binder are subject to certification by the American Bureau of Shipping [fol. 27] prior to payment of loss; any variation between the speed, tonnage or refrigerated cargo capacity noted hereon, and the certification of the American Bureau of Shipping will modify the amount of insurance accordingly.

2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.

It is understood that all other terms and conditions of this remain unchanged.

(S.) Robert Doyle, for Director of Wartime Insurance War Shipping Administration.

Date July 23, 1942.

[fol. 28] IN UNITED STATES DISTRICT COURT

LIBEL OF STANDARD OIL COMPANY OF NEW JERSEY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

A. 153-203

The libel of Standard Oil Company of New Jersey, as owner of the steam tanker John Worthington, against United States of America, in a cause of contract and war risk insurance, civil and maritime, alleges on information and belief, as follows:

First: At all times hereinafter mentioned libelant was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and place of business at 15 West 51st Street, Borough of Manhattan, New York City, in the Southern District of New York and was the owner and operator of the steam tanker John Worthington.

Second: At all times hereinafter mentioned libelant was and still is a corporation sovereign, acting by and through the Director of War Time Insurance, War Shipping Administration, with respect to the contract of war risk insurance hereinafter set forth.

Third: At all times hereinafter mentioned War Shipping Administration was and still is an agency of respondent created by the President's Executive Order of February 7, 1942, No. 9084, and at all such times Emory S. Land was the Administrator thereof.

[fol. 29] Fourth: On or about April 20, 1942, during the period of national emergency declared by proclamation of the President, the Administrator, War Shipping Administration, acting for respondent under authority of the Merchant Marine Act, 1936, as amended, and the President's Executive order of February 7, 1942, No. 9054, requisitioned the use of the John Worthington on a time charter basis, effective on taking delivery thereof. Said vessel was delivered to and taken by respondent at the port of St. Georges, Bermuda on April 22, 1942. Continuously thereafter and at all times mentioned in the libel, said vessel was employed by and operated for respondent in accord-

ance with the terms and conditions of said requisition time charter.

Fifth: Thereafter respondent and libelant, the former represented by the Administrator, War Shipping Administration, acting under the authority of said Act and said Executive Order, agreed upon and executed a "Requisition Time Charter" for the use of said vessel from the time of said taking (Warshipoiltime Form No. 102, 5/22/42) dated as of April 20, 1942, and designated as Contract No. W.S.A. 1548-R. Said charter was in full force and effect at all times mentioned herein.

Sixth: Part II, Clause 20 of said charter, pertaining to insurance, provided in part as follows:

> "Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy [fol. 30] of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto; • • •"

Seventh: Pursuant to the provisions of said charter, libelant elected war risk insurance valuation Option No. I providing for a valuation of $935,625.00.

Eighth: Thereafter, in consideration of the mutual covenants and agreements contained in said charter and pursuant to respondent's obligations thereunder, War Shipping Administration, acting by and through the Director of War Time Insurance and for said Administrator and for said respondent, under authority of said Executive Order and Title II of said Act, executed and delivered to libelant, as the assured, its War Risks Binder No. R.C. 401 dated July 23, 1942, whereby it insured libelant and caused libelant to be insured against war risks only as therein stated, from the time of delivery of said vessel to War Shipping Administration under said charter, to the termination of said charter. A true copy of said Binder with Endorsement No. 1 attached is annexed hereto as Schedule "A" and made part hereof.

Ninth: Pursuant to respondent's obligation under said charter and said binder, and effective from the time of delivery, as aforesaid, said Administrator also caused said vessel and all the risks listed in said Binder to be entered, carried and insured in the "Marine and War-Risk Insurance Fund" appropriated by Congress and main-[fol. 31] tained in the Treasury of the United States for the use of said Administrator in carrying out the provisions of Sections 221-229 (Subtitle-Insurance) of said act; and, as required by said charter and said binder, said Administrator paid the premiums of said insurance by depositing certain sums to the credit of said Marine and War-Risk Insurance Fund, as premiums for said insurance.

Tenth: Said War Risks Binder R.C. No. 401 contained, among others, the following provisions:

> "3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. No claim for loss of life or personal injury or from other causes shall be recoverable hereunder unless in accordance with the terms and conditions of the standard form of policy as prescribed by the War Shipping Administration."

Endorsement No. 1 dated July 23, 1942 attached to said War Risk Binder, contained, among others, the following provisions:

> "2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto."

[fol. 32] Eleventh: The full form of standard marine and war risk policy of War Shipping Administration in effect at the time of issuance of said Binder and at all times mentioned herein, contained, among others, the following provisions:

> "By This Policy of Insurance Does, in accordance with applicable provisions of law and subject to all

limitations thereof, make insurance and cause to be insured, lost or not lost:

. . . . . .

For Account of . . . . . .
but subject to the provisions of this Policy with respect to change of ownership.

* * *

Beginning the Adventure

Upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services, and trades whatsoever and wheresoever, under steam, motor power, or sail; * * *

* * *

Full Collision

And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship [fol. 33] or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur or be compelled to pay; * * *

* * *

F. C. & S. Clause

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolu- [fol. 34] tion, rebellion, or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

* * *

War Risk Clauses

Form No. 7-A.

Endorsement to be attached to and be made a part of Policy No. .....

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not, and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding [fol. 35] arrest, restraint, or detainment under cus-

toms or quarantine regulations, and similar arrests, restraints, or detainments not arising from actual or impending hostilities or sanctions.

Twelfth: On June 5, 1944 respondent, as owner of the United States Ship YMS-12, a mine sweeper, instituted an action against libelant in this Court, Clerk's Docket No. Ad. 131-151, for recovery of damages alleged to have been sustained by respondent with respect to said YMS-12 by reason of collision with the John Worthington, in the approximate sum of One Hundred Fifty Thousand ($150,000) Dollars. It is alleged in said libel that on December 16, 1942 a collision occurred between said YMS-12 and the John Worthington between 5:00 and 6:00 on the morning of December 16, 1942, while the YMS-12 was part of a formation of three mine sweepers which were engaged in mine sweeping in a buoyed channel in the approaches to New York Harbor.

Thirteenth: On December 7, 1945 libelant through its proctors herein notified respondent through War Shipping Administration, Insurance Division, that said proctors had advised libelant that any liability on its parts or of the John Worthington is covered by said war risk insurance; asked respondent's consent, as war risk underwriter, that said collision action be defended for its account; and notified respondent that libelant would look to respondent for full indemnity as to any and all liability for damages sustained by the YMS-12 or by the United States by reason of said alleged collision, together with all costs and expenses incurred by libelant in the defense of said collision action.

[fol. 36] Fourteenth: By letter dated December 14, 1945 to proctors for libelant, received on December 21, 1945, respondent, acting through War Shipping Administration, Division of War Time Insurance stated, among other things, that the war risk protection afforded the John Worthington under said charter does not include claims under the Running Down Clause; that the defense of said collision action would appear to be solely for the account of libelant.

Fifteenth: On January 8, 1946 libelant, as respondent in said collision action, filed answer to said libel denying any and all liability for or with respect to said alleged collision. Said collision action is now pending.

Sixteenth: Thereafter respondent and libelant concluded an agreement for settlement of the collision liabilities in said collision action on the basis of mutual fault, without interest, and without prejudice to any rights of libelant herein under the war risk insurance on the John Worthington. Libelant was informed on March 21, 1946 that the Attorney General had approved said agreement for settlement of collision liabilities. Negotiations toward an agreement between the parties as to the amount of damages sustained by respondent with respect to the YMS-12 by reason of said alleged collision, are now in progress.

Seventeenth: At the time of said alleged collision, the John Worthington was outbound from New York in ballast and was proceeding to sea in convoy. Subsequent examination of the John Worthington did not disclose any damage or evidence of contact with any other vessel.

[fol. 37] Eighteenth: Libelant has not yet sustained any loss with respect to the John Worthington or otherwise by reason of said alleged collision, but libelant has been obliged to incur liability for costs of defense of said collision action in excess of the sum of Five Thousand ($5,000) Dollars, so far as can now be estimated. Such liability, and such costs of defense as and when paid by libelant, are covered by the terms of said war risk insurance. If, as and when libelant may be compelled to pay any sum with respect to damage sustained by or with respect to said YMS-12 by reason of said alleged collision, whether by virtue of a decree in said collision action or otherwise, any such loss sustained by libelant will be due to or in consequence of one or more of the adventures and perils covered by said War Risk Binder R. C. No. 401 and the war risk clauses attached to said full form of standard marine and war risk policy in effect at the date of said alleged collision as hereinabove set forth, and respondent thereby insured libelant against any and all loss with respect thereto. Libelant reserves the right to amend this libel to claim herein the amount of any such loss so sustained and further to claim the amount of any further costs of defense which libelant may incur or be compelled to pay with respect to the defense of said collision action.

Nineteenth: Libelant was not insured against such liability or loss by any policy or contract of insurance other

than the insurance provided by respondent as aforesaid. Libelant is the person entitled to all payments due thereunder.

Twentieth: Libelant has duly performed each and all of the terms and conditions of said charter and of said contract of insurance on its part to be performed.

[fol. 38] Twenty-first: By reason of the premises, respondent United States of America, as war risk underwriter of libelant with respect to the John Worthington, as aforesaid, is liable to libelant for any and all losses which may be sustained by libelant with respect to the John Worthington by reason of said alleged collision, and for any and all costs of defense which libelant has incurred or shall incur or be compelled to pay with respect to said collision action, Clerk's Docket No. Ad. 131-151.

Twenty-second: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that respondent United States of America be required to appear and answer in the premises; that libelant may have decree against respondent for the amount of any and all damages which it has sustained or which it may sustain by reason of the matters hereinabove alleged, with interest; that libelant may be permitted to amend this libel to claim further damages and losses after the amount of libelant's damages and losses in the premises are definitely known; and that libelant may have such other and further relief as may be just.

Kirlin Campbell Hickox & Keating, Proctors for Libelant, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

(Duly verified December 12, 1947.)

[fol. 39] SCHEDULE "A"

This exhibit is identical with Schedule A annexed to Answer of Standard Oil Company of New Jersey printed *ante*, pp. 24-27 inclusive.

[fol. 40] IN UNITED STATES DISTRICT COURT

ANSWER OF THE UNITED STATES OF AMERICA TO THE LIBEL OF STANDARD OIL COMPANY OF NEW JERSEY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Answer of the United States of America to the Libel of Standard Oil Company of New Jersey, as owner of the Steam Tanker John Worthington, in an alleged cause of contract and war risk insurance, civil and maritime, alleges on information and belief as follows:

First: It admits the allegations contained in the Article of the libel numbered First.

Second: It admits the allegations contained in the Article of the libel numbered Second.

Third: It admits the allegations contained in the Article of the libel numbered Third, except it denies that Emory S. Land now is the Administrator of War Shipping Administration.

Fourth: It denies the allegations contained in the Article of the libel numbered Fourth, except it admits that, at the times mentioned therein, the War Shipping Administrator pursuant to the authority mentioned therein and other provisions of law, requisitioned the use of St. John Worthington and subsequently entered into a time charter party with respect to her operations, and that the John Worthington was delivered for operation pursuant to a time charter at the time and place mentioned and was thereafter [fol. 41] operated pursuant to a charter between libelant and respondent.

Fifth: It admits that respondent and libelant entered into a time charter party designated Warshipoiltime, Form 102 5/22/42, dated, as of April 20, 1942, No. WSA 1548-R, and respectfully refers all questions of law to the Court.

Sixth: It admits that the charter party referred to in Article Fifth of this answer contained the language set forth in Article Sixth of the libel and refers to the Court all questions as to the meaning or effect thereof.

Seventh: It admits that the John Worthington was valued at the sum of $935,625.00 for the purposes of the war risk insurance provided by respondent pursuant to the aforesaid charter.

Eighth: It admits that it issued to libelant the war risk binder described in Article Eighth of the libel, a copy of which will be produced at the trial of this action and respectfully refers to the Court all questions of law as to the meaning or effect thereof.

Ninth: It admits the allegations of fact contained in the Article of the libel numbered Ninth and respectfully refers all question of law to the Court.

Tenth: It admits that War Risks Binder RC 101 and its endorsement contained the language set forth in Article [fol. 42] Tenth of the libel but, for greater certainty, begs leave to refer to the original thereof which will be produced upon the trial of this action and refers to the Court all questions as to the meaning or effect thereof.

Eleventh: Respondent begs leave to refer to the original of the full form standard marine and war risk policy of War Shipping Administration referred to in Article Eleventh of the libel which will be produced upon the trial of this action for the wording contained therein and refers to the Court all questions of law as to the meaning and effect thereof.

Twelfth: It admits the allegations set forth in Article Twelfth of the libel.

Thirteenth: It denies the allegations set forth in Article Thirteenth of the libel, except it admits that libelant's proctors sent respondent a letter dated December 7, 1945, which will be produced upon the trial of this action and respectfully refers to the Court all questions of law as to its meaning and effect.

Fourteenth: It denies the allegations set forth in the Article of the libel numbered Fourteenth, except it admits that it sent libelant's proctors a letter dated December 14, 1945, a copy of which will be produced upon the trial of this action and respectfully refers to the Court all ques-

Fifteenth: It admits the allegations set forth in the Article of the libel numbered Fifteenth.

Sixteenth: It admits the allegations set forth in the Article of the libel numbered Sixteenth.

[fol. 43] Seventeenth: It admits the allegations set forth in the Article of the libel numbered Seventeenth.

Eighteenth: It denies the allegations of the libel set forth in the Article of the libel numbered Eighteenth.

Nineteenth: It denies the allegations contained in the Article of the libel numbered Nineteenth, except in so far as the same are admitted in a certain stipulation dated October 5, 1948, to be filed upon the trial of this proceeding.

Twentieth: It denies the allegations contained in the Article of the libel numbered Twentieth, except in so far as the same are admitted in a stipulation dated October 5, 1948, to be filed upon the trial of this proceeding.

Twenty-first: It denies the allegations contained in the Article of the libel numbered twenty-first.

Twenty-second: It admits the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court and denies the remaining allegation contained in the Article of the libel numbered Twenty-second.

Wherefore, respondent prays that the libel herein be dismissed with costs.

John F. X. McGohey, United States Attorney, Proctor for United States of America, Admiralty Division, 45 Broadway, New York 6.

(Duly verified October 22, 1948.)

[fol. 44] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 131-151

[Same titles]

A. 153-203

Statement of Evidence

Before: Hon. Sylvester J. Ryan, District Judge

New York, October 8, 1948, 10:30 a. m.

APPEARANCES:

John F. X. McGohey, Esq., United States Attorney, Proctor for United States of America; By Edward L. Smith, Esq., Special Assistant Attorney General, and Louis Greco, Esq., Special Attorney.

Kirlin, Campbell, Hickox & Keating, Esqs., Proctors for Standard Oil Company of New Jersey; Edwin S. Murphy, Esq., and Raymond T. Greene, Esq., of Counsel.

[fol. 45] COLLOQUY

The Court: I understand you are going to move to consolidate the two suits?

Mr. Murphy: I would like to make that motion, for purposes of trial.

The Court: Yes.

Mr. Murphy: And if the Court please, before Mr. Smith begins, I would like to hand up an appendix to my trial memorandum, which is nothing more than copies of excerpts of the documents to which we want to refer. It will be more convenient to have them in that form than in the large policy form, if your Honor will insert that at the end of my trial memorandum.

Mr. Smith: Mr. Murphy, I am told that there is a defect in our pleadings and that we haven't filed an answer to your war risk insurance suit. Is that true?

The Court: There is no answer in the file.

Mr. Murphy: That is true.

Mr. Smith: May it be stipulated the allegations of your libel may be deemed denied except insofar as admitted in our libel?

Mr. Murphy: As to facts, yes, that is agreeable.

The Court: Wouldn't it be better to submit a formal answer?

Mr. Smith: I will be very glad to do that.

The Court: And, for the purposes of this argument, we will deem that your statement covers what will be contained in the answer. I think there should be a formal written answer.

Mr. Smith: I will see that is submitted before the briefs, sir.

GOVERNMENT'S PRELIMINARY STATEMENT

If your Honor please, both of these proceedings arise [fol. 46] out of a collision in the swept channel off Ambrose during the war.

We have both agreed that that collision was the result of mutual fault in navigation of the two vessels involved.

The vessels involved were a tank ship, owned by the Standard Oil Company, and the Government mine sweeper YMS-12.

The Government has sued for the damage sustained by the YMS-12. The tank ship sustained no damage whatsoever. And if we should just stop there, as the Government hopes eventually to do, the Government would be entitled to a decree for half of the damage sustained by the YMS-12.

The Standard Oil Company, however, contends that, because the tanker was under charter to the Government, which charter contained a requirement that the Government issue war risk insurance, insuring the tanker against certain specified risks of war, and that the Government did issue that insurance in the form agreed upon by the parties, that it has a defense to our claim for half damage, and that it has an affirmative right, which it has asserted in a cross-suit, or in the consolidated proceeding, to indemnity against that liability to the Government.

I would like to offer, on behalf of the Government, the stipulation of facts, containing as exhibits annexed thereto the charter party and the policy of insurance, which the Standard Oil Company relies upon as its defense to these proceedings.

The Court: I understand that the liability has been

fixed, liability arising out of the collision has been fixed, by stipulation.

Mr. Smith: Both sides have stipulated that.

[fol. 47] The Court: I think that stipulation should be put in the record.

Mr. Smith: I have just offered it in evidence.

(Marked Government's Exhibit 1.)

The Court: The only issue here is whether or not the tanker was covered by the policy of insurance issued by the Government?

Mr. Smith: There is no issue about that. The tanker was covered. The only question—

The Court: Is whether the coverage extended—

Mr. Smith: —whether the liability of the tanker to the Government is within the policy coverage. I will confine my opening remarks to those issues, whether the policy covers and whether there is anything in the charter party which exonerates the Oil Company from the liability which it is stipulated it would otherwise have.

The pertinent phrase of the policy, which the Oil Company will urge upon your Honor entitles them to indemnity against this liability, is the phrase insuring the Oil Company against all consequences of hostilities or warlike operations. I don't think that there is any other language which has any real bearing on the case insofar as the insurance policy is concerned.

The language which the Government contends governs the case is the language in the charter party, Clause 20 of the charter party, and that language contains an agreement by the Oil Company, "Except as to risks or liabilities assumed, insured or indemnified against by the charterer pursuant to this charter,"—and that is the Government—"unless otherwise agreed, the owner shall assume or insure [fol. 48] against all other risks or liabilities of whatever nature including without limitation those of a Marine Hull and P. and I. nature and such Hull and P. and I. coverage shall also protect the interests of the Charterer to the extent of the liability it would have if it were the owner of the vessel."

I have set forth both of those sets of language on pages 3 and 4 of the Government's trial memorandum for convenience.

Briefly, the facts of the collision are that the Government mine sweeper was proceeding in the swept channel in a formation of three small mine vessels and, for the Court's convenience, I would like to indicate the general area of the swept channel (indicating).

The Court: Neither side is presenting evidence?

Mr. Smith: No, but we have a set of pleadings which admits facts, we have a stipulation which admits other facts, and I think, from the admitted facts and from the stipulation, you have all the facts which you need to try the case.

The Court: As I understand it, then, the only facts that are before the Court, for the determination of this issue, are the facts admitted by the pleadings and the facts embraced in the stipulation?

Mr. Smith: I don't think that is quite accurate because I believe Mr. Murphy wants to offer some documentary evidence.

Mr. Murphy: The last paragraph of the stipulation gives either party the right to present further evidence.

The Court: In the absence of further evidence being presented here today, the only facts before the Court are those admitted by the pleadings and those embraced in [fol. 49] the stipulation or other facts that might be presented and offered at this hearing.

Mr. Smith: Yes, and I think the Court may take judicial notice of the chart. I want to have before you a chart showing the general area where this occurred.

In general, this is not accurately the limits of the swept channel. Generally the swept channel follows about that red cable area.

The Court: Where it says "See cable note"?

Mr. Smith: That is right.

The Court: Don't you think we ought to mark this?

Mr. Smith: To be more accurate—

The Court: Is there any dispute about that?

Mr. Smith: To be more accurate, I would like also, later, to have you take judicial notice, or accept in evidence, "Notice to Mariners" which accurately states the location of the center line buoys of the swept channel.

Mr. Murphy: No objection to that, and that, as applied to the chart, will control. No objection.

The Court: Suppose we mark the chart in evidence, and suppose we mark this navigation notice from the Coast Guard in evidence.

Mr. Smith: Fine.

The Court: You don't want to offer in evidence that letter annexed to the notice to mariners?

Mr. Smith: No, I would like to detach that.

(Marked Government's Exhibit 2 in evidence.)

Mr. Murphy: If the Court please, I have just looked at this notice to mariners. It is dated August 14, 1945. This collision occurred December 16, 1942. I have no objection [fol. 50] to this going in, but if it should become, in any way, material to show that the location of these center line buoys is not what it was on December 16, 1942, I would like to have the right to offer other proof. I don't think it will ever become material.

Mr. Smith: I don't think so either, and I have no objection to that reservation.

The Court: What is the purpose of offering it in evidence?

Mr. Smith: I simply want to have in the record some proof of the general area in which this collision occurred.

The Court: This is only proof of the condition that existed some two or three years after the collision.

Mr. Smith: Mr. Murphy has agreed this may go in as the controlling evidence of the general area of the collision, unless it is found there is some important discrepancy between the channel as indicated in this notice to mariners and the channel as it existed on the date in question.

The Court: In the absence of other proof, I am to take it the conditions were the same at the time of the collision as set forth in this notice to mariners, which will be marked Government's Exhibit 3.

Mr. Smith: That is right.

(Marked Government's Exhibit 3, in evidence.)

Mr. Smith: The material facts of the collision as I see them are that the Government mine sweeper, as one of a formation of three mine sweepers with mine sweeping gear streamed, was proceeding the swept channel, and, in general, following a course approximating the dotted red line on the chart.

[fol. 51] The Government mine sweepers were lighted; they had not only their navigation lights set, they also had

the special lights visible all around the horizon which, by another notice to mariners, were designated as notification to approaching ships that this was a mine sweeper towing mine sweeps, and that fact has been stipulated.

The tank ship was part of a convoy which had formed up into a single line and was entering the harbor—

Mr. Murphy: Excuse me, outbound, leaving the harbor.

Mr. Smith: That is right.

Mr. Murphy: You said "entering".

Mr. Smith: I am sorry. They also were lighted. There is no dispute that they saw the mine sweeper and that they continued on until this collision occurred, and did not keep clear of the mine sweeping vessel.

They have alleged in their pleadings that we were guilty of various maneuvers that contributed to the collision and failed to avoid it. We do not agree to all the allegations of fault, but we have stipulated that our avoiding maneuvers were at fault and that the collision ensued.

This is the sort of collision which is the subject of practically all of the cases on the admiralty dockets involving collisions. It involves navigation of two vessels in the approaches to New York harbor, and it is the Government's contention that the proximate cause of the collision was the negligent navigation of the two vessels, and that the collision was not, for insurance purposes, the result of a mine sweeping operation, which is the only warlike operation or act of hostility involved in the case.

In support of our contention we have cited, and rely very largely upon, a well considered opinion of Judge Galston in the Eastern District, in which he held that a [fol. 52] collision between a destroyer, fully armed, bound out to patrol this very area in which this collision occurred—

The Court: Isn't there a difference or distinction to be made between the facts in that case and the facts presented here?

Mr. Smith: The distinctions are distinctions without a difference.

The Court: On the facts it would appear the Government vessel was actually engaged in mine sweeping. It was actually at the site of its operations.

Mr. Smith: I don't think Judge Galston's opinion turns on the question of whether or not the warlike operation was actually commenced or not.

The Court: If it had not actually commenced, it certainly wouldn't be present. There would be no warlike operation.

Mr. Smith: I think it was sharply in dispute as to whether or not you could say that the navigation of this vessel from its base towards the area it was assigned to patrol was not a warlike operation.

I think the gist of Judge Galston's opinion is contained in his language that "everything that happens in the course of a warlike operation is not caused by a warlike operation;" that is, a warlike operation is a circumstance, a condition, and, for insurance purposes, you have to look to the proximate cause, the cause nearest to the loss, to quote the Napoli, and just because a vessel happens to be engaged in a warlike operation does not make the happening of every event that transpires during the course of that warlike operation the consequence of the warlike operation.

I would like to quote to your Honor, on that point, Judge Galston's language. Judge Galston said, after quoting with approval an excerpt from the Coxwold,

> [fol. 53] "Thus the inquiry should be whether the collision was in consequence of a warlike operation, not did it happen in the course of a warlike operation."

He went on to say that this collision was not proximately caused or contributed to by hostilities or warlike operations, and that the cause nearest to the loss, citing Queen Insurance Company v. Globe Insurance Company, the proximate, not the remote cause, must be held to be negligence in navigation in a peaceful harbor.

The Court: That is the end of his opinion.

Mr. Smith: And that the vessel in collision with the civilian ship chances to be a warship constitutes at most a remote but not a proximate cause.

The Court: Just taking that sentence, "must be held to be negligence in navigation in a peaceful harbor." Can you say the harbor, being swept for mines, was a peaceful harbor?

Mr. Smith: This was an area just outside New York harbor, which was being traversed by lighted merchant ships. It is true, as a precaution, in case the enemy should attempt to come in and commit depredations against our commerce, we had laid mines about, and we were keeping

the area open, and that the laying of the mines and the policing of the mines undoubtedly are part of the warlike operation, but the fact remains there were no warlike operations going on in this area at the time.

The Court: What was the sweeping of the channel?

Mr. Smith: The sweeping of the channel——

The Court: They weren't doing it for practice, were they?

[fol. 54] Mr. Smith: No, they were sweeping the channel to make sure nothing had broken adrift from its moorings or that the enemy had not planted any mines in the channel.

The Court: And they regarded it as a possible situs of a war activity.

Mr. Smith: These were precautionary steps being taken against possible enemy action but the harbor was peaceful enough. There wasn't any enemy action in progress. This was a precautionary act.

The Court: There weren't any enemy ships present——

Mr. Smith: That is right.

The Court: —dropping mines, which were visible.

Mr. Smith: That was also true in the case that Judge Galston decided. This ship was going out to search out with radar and sonar for the presence of enemy submarines. That was a warlike enough operation. She was there, designed to sink any enemy that wandered into the area.

The Court: After they had reached the rendezvous.

Mr. Smith: I don't think that Judge Galston placed any reliance upon that. I think the very tenuous distinction between whether she happened to arrive at a certain point which, under her instructions, was her patrol area and whether she was en route to it, made absolutely no difference. It was agreed that she was to receive no further orders after she arrived at this patrol area, she would sink an enemy submarine under her orders, if she met one, before arriving, as she was bound to do, if that should occur. The only difference is, when she got there, she would be under a duty to actively use her radar and sonar, and I don't think that makes any material difference in the result.

The Court: There was another point that struck me—I would like to have your view on it—as I read Judge Gal-
[fol. 55] ston's opinion: the site of the collision in the case which he decided was off Staten Island, and the site

of this collision was considerably out in the mouth of the harbor, almost in the open.

Mr. Smith: I think that that is a distinction without a difference of the most obvious kind.

The navigation of the two areas was just the same. Both areas were traversed by lighted ships. This was not a collision contributed to in any way by the precautions taken by the ships themselves to avoid the enemy, going blacked out or anything of that sort. They were proceeding in an area that was remote from any theatre of operations by the enemy at the moment, and it was a peaceful area in which precautionary operations connected with the conduct of hostilities were in progress, in both cases. In one case a patrol was going on, in the other case we were making sure nobody planted any mines. There is no difference in the way the ships handled themselves which resulted from the difference in location of the two collisions.

The Court: You don't mind my interrupting?

Mr. Smith: No, I am glad to have you do so.

The Court: Because, as the case goes along, I want to get your views on certain matters that come to my mind.

If you should find it more convenient, I will reserve my questions until later.

Mr. Smith: No, I prefer to have you ask me questions because I want to know how you approach the problem.

I think, in this connection, we must and should emphasize the doctrine of proximate cause in marine insurance law as it has been developed in the American cases. That doctrine, I think, as it applies to collisions, was really roughed out and stems very largely from The Napoli, that [fol. 56] is our leading case in the Supreme Court, and in that case there was a collision between blacked out ships in convoy, in a war area, active war area, there is no question about that, and there was also no question but, for the operation in convoy in controlled and restricted waters, and pursuant to military orders by the convoy escorts, that the collision would never have occurred.

Nevertheless, three courts passed upon the question of whether there was any causal connection between hostilities or warlike operations in that collision, and all of them came to the conclusion there was none within the meaning of a marine insurance policy construed, with respect to proximate cause, narrowly, as such policies must be con-

strued, where the only risk assumed by the underwriter is the extraordinary hazard of war and not the usual, ordinary marine hazards; and in that connection I think the rationale of all the cases, District Court case and the Supreme Court case, is summed up by Judge Hough in a single sentence in the District Court, "It is my personal opinion * * * that * * * the navigators of both The Napoli and the Lamington failed in their ship management to exercise the ordinary care and skill of their calling. Therefore, such negligence was the proximate cause of the collision and the loss must fall on the marine underwriters."

And that language applies one hundred per cent to this case. The proximate cause of this collision was the failure of the tanker to stay clear of this mine sweeping formation, which it was obliged to stay clear of, and the failure of our vessel to take appropriate avoiding action after she saw she wasn't going to stay clear.

The Court: This mine sweeping operation is an unusual formation. It involves three ships spread out, proceeding [fol. 57] not together or abreast, but proceeding in an unusual formation.

Mr. Smith: A mine sweeping operation—and I think you might probably take judicial notice of what is so well known—is a formation of vessels, each of which streams out behind it a device on a long cable which, towed along a certain distance under the water, is designed to cut the cable of any mine and bring it to the surface, where it can be destroyed by gunfire and the like. They go along the way lawn mowers are operated sometimes on golf courses. You have undoubtedly seen them mowing golf courses with three mowers at once.

The Court: I will take judicial notice of it. I think it is alleged in the complaint, and I don't think there is any dispute about that, is there?

Mr. Murphy: No.

The Court: And you don't dispute counsel's description of the formation of these mine sweeping vessels?

Mr. Murphy: No, sir.

The Court: Here is what I had in mind: you have an unusual formation.

Mr. Smith: Well, you have a formation of three vessels, towing something behind them. The purpose of this par-

ticular tow happens to be to pull up any mines that are in the area. The purpose of other tows is to get log rafts or buoys from one place to another.

The Court: They are towing something which is not usually encountered in waters around New York harbor.

Mr. Smith: Well, it is the towing of a submerged object but there are rules with respect to the kinds of lights which normal peacetime vessels are supposed to display when they tow submerged objects.

[fol. 58] The Court: Isn't it an unusual object, an object you don't find in a peacetime operation?

Mr. Smith: The particular operation happens to be an unusual operation but it is not at all unusual to have a vessel tow a submerged object. There are rules, inland rules, which require certain lights to be displayed, and certain shapes to be displayed, and so forth, in such event. This is all this is, basically, towing a submerged object.

The Court: Isn't it more than the usual submerged object? Isn't it a submerged object which is characteristic of a wartime operation?

Mr. Smith: I have no dispute whatsoever that towing the mine sweeps, constituted an operation in the course of hostilities or warlike operations. I don't think there is any doubt about it. The only point I make is, for purposes of an insurance policy, that was a condition and not a cause of this collision.

The Court: I want to follow through my thoughts and hear your views on it. Didn't this unusual condition, that was the result of a wartime operation, restrict and impede, to some extent, freedom of navigation?

Mr. Smith: So does towing any submerged object. It is a perfectly lawful thing to do.

The Court: Wasn't this a little more than the towing of a usual submerged object?

Mr. Smith: I don't think it was anything more. It was towing a particular kind of submerged object for a certain purpose, and I don't think that it impeded navigation or did anything different than the towing of a submerged object generally or than is involved in dredging operations, for example, and they are special operations which involve cables being led from the corners——

[fol. 59] The Court: You would not compare mine sweeping operations with a dredging operation, would you? A

dredging operation proceeds at a slow rate of speed and, in many cases, it is practically stationary.

Mr. Smith: The dredge, however, has cables extending out from it under water.

The Court: But the rate of speed is slower, and you don't generally find dredges, with grab buckets, in a formation such as you have here.

Mr. Smith: Oh, I quite agree, your Honor, that there is a difference between this particular towing of a mine sweep and a dredging operation, and between this particular towing of a mine sweep and the towing of other submerged objects. I say it is a distinction without a difference. It doesn't impede navigation any more than a dredging operation. It is not any more than the towing of other submerged objects. It is a particular kind of a towage of a submerged object, for a certain purpose.

The Court: Whether or not it impeded navigation more than a dredging operation or the towing of a submerged object in peacetime, here you have a situation which impedes navigation, which is the result of a warlike operation. Does that make it a war risk?

Mr. Smith: I say it doesn't make it a war risk because that was a condition. Any causal connection between the fact that the vessel was navigating on a war mission and the happening of this collision was broken by the intervening negligence in the ordinary navigation of both craft, and I say, for purposes of marine insurance, under American law, you have to determine what the proximate cause is.

[fol. 60] You don't say, as some lower court English decisions have said, in cases where they didn't have to say it, and which I don't think have been followed where it has been material, that everything that happens in the course of navigation on a war mission is the consequence of the warlike operation. That is not the law over here or in England. The law is that only those consequences of the operation which proximately flow from the operation, and which are not the result of some intervening cause, such as negligence in the ordinary conduct of the vessel's business——

The Court: Let us see now if I get your position correctly. The Government concedes, does it, that it was engaged in a warlike operation at the time of the collision?

Mr. Smith: Towing a mine sweep is a warlike operation.

The Court: In this particular case.

Mr. Smith: We were towing a mine sweep, and towing a mine sweep is a warlike operation.

The Court: Does the Government concede that at the time of the collision the Government vessels were engaged in a warlike operation?

Mr. Smith: I don't concede anything. I think that is a question of law. I think if I were deciding it that that would be a warlike operation.

The Court: That is not a question of law.

Mr. Smith: The fact is that we were towing a mine sweep. We concede that. I think that towing a mine sweep is a warlike operation. Somebody else might think differently.

The Court: The Government concedes that, in the conduct of this warlike operation, it was negligent?

Mr. Smith: No, I don't concede that. I say we did nothing negligent about towing the mine sweep. The only thing [fol. 61] we did was failed to take ordinary navigational avoiding action, open to us by the use of our rudder and our engines, which could have avoided the collision, and had nothing to do with towing the mine sweep.

The Court: I want to get the effect of this stipulation. The Government concedes its vessel was negligent?

Mr. Smith: We were negligent—let me quote you the stipulation on that point, that is controlling.

The Court: Yes, I would like to get that in my mind.

Mr. Smith: It says, "The aforesaid collision was contributed to both by fault in the navigation of the S. S. John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with the applicable rules for prevention of collisions and the requirements of good seamanship under the circumstances."

Nothing to do with towing the mine sweep.

Mr. Murphy: "Under the circumstances."

The Court: All right.

Mr. Smith: If it is a further contention and Mr. Murphy says it did have anything to do with mine sweeping, he will have to exercise his prerogative under the last paragraph of this stipulation and put in some evidence on that score,

because it is his burden to show, if that is material, what towing a mine sweep had to do with this collision.

I have cited a few cases in my trial memorandum, and I will cite a great many more cases in my principal brief, when I have had an opportunity to collect them more at length, which will support my view that the American law requires that you disregard the mere circumstance that the vessel happened to be engaged in a warlike operation [fol. 62] and look to the immediate producing cause of the collision. In this case it was failure to obey the rule designed to prevent collisions.

We have had case after case in the Court of Claims in which, during the Civil War, troop transports, actually engaged in landing troops in enemy areas, were guilty of navigational fault—strandings in the course of operations because of navigational fault—not to fall within Government insurance against the consequence of hostilities.

I think I may more usefully take up the balance——

The Court: Wasn't this whole situation brought into being by the negligent operation of your Government vessel while conducting a warlike operation?

Mr. Smith: This situation was brought into being by the negligence of Mr. Murphy's client's vessel in running down the mine sweeping formation and contributed to by the fact that we did not take the avoiding action we might have taken if we had been properly alert after the danger of being run down by him became apparent.

The Court: Your stipulation does not confine negligence to any avoiding action.

Mr. Murphy: I was going to say that, your Honor. The stipulation controls, not Mr. Smith's version.

Mr. Smith: I quite agree, but the stipulation does confine the negligence to negligence consisting of the failure to obey rules for the prevention of collision and the requirements of good seamanship.

Mr. Murphy: Under the circumstances.

Mr. Smith: Under the circumstances, yes. It has nothing to do with towing a mine sweep.

The second point that the Government urges, and the point which is not covered by the decision of Judge Galston [fol. 63] in the Eastern District, is a point of first impression and one which is of considerable moment, I think, if your Honor reaches it. Your Honor doesn't reach the second question at all unless you find that this collision was

proximately caused by hostilities or warlike operations. If you agree with our first point, that there was no causation, no proximate causation from an insurance point of view, between the mere fact that we were engaged in towing this mine sweep and this collision was the result of failure to obey rules to prevent collision, you don't come to the second question at all. But if you do find that, then you have to decide the $64 question, does the second Warilda decision in the House of Lords govern American insurance policies?

That issue is merely this: in the House of Lords the collision between the transport ship Warilda and a merchant vessel was litigated three times. The first time they decided that the collision was the result of mutual fault. Then it went back again and the second time they decided it was the result of a warlike operation. And then, the third time up, the question before the court was the question which you have—and it is called the so-called second Warilda decision, although it is really the third, and that is, whether or not liability, as distinguished from physical damage, is covered by a war risk insurance policy.

The House of Lords decided that it was not, and they decided it on two grounds. The first ground arises from the history of the liability coverage. The English cases have decided, and it is now clear law all over the world, that a marine insurance policy, standing alone, without the so-called running-down clause, does not insure against the liability of the insured ship to another ship as a result [fol. 64] of a collision. It only covers the physical damage to the insured ship as a result of the collision or of the disaster.

But it became customary for ship owners to get from marine underwriters coverage against liability. It may be compared with automobile liability insurance except it is much older. And the way they usually effected that other insurance was by getting endorsement on their marine policy against physical damage to their vessel, and after a while that endorsement ceased to be in the form of a separate paper, either physically affixed to the policy or entirely separate, and it was incorporated as a clause in policies where they wanted both types of coverage. It is a separate coverage of a risk which is held to be not an ordinary marine risk. It is a liability insurance.

The House of Lords said that the endorsement of the marine policy which excludes from its coverage, that is,

the usual ordinary marine policy—let me go back a little bit to get this point clear.

When the Napoleonic wars developed, after this other practice developed, the marine underwriters, who originally were liable for all marine disasters, whether the result of war or action of the King's enemies, pirates or rovers or what not, began to find, in dangerous times, that was too great a liability for them to cover, and they began to require special premiums, which varied greatly on conditions, for that kind of coverage, and they started to endorse their marine policies with a clause which excluded the extraordinary perils of war from ordinary coverage, and that clause is called the F. C. and S. Clause, free of capture and seizure clause, and it is the clause which excludes from the marine policy the consequences of hostilities or warlike operations.

[fol. 65] Then, for a separate premium, they would insure all the risks excluded from the ordinary marine coverage by that F. C. and S. Clause, and that is what a war risk policy is. It is a policy of insurance, insuring all the risks excluded from a marine insurance policy by the free of capture and seizure clause.

The House of Lords said that that clause excluded only risks covered by the basic marine policy, namely, physical damage to the vessel, and it did not exclude any of the risks assumed by the marine underwriters when they wrote their separate running-down liability coverage. That was ground one of the Warilda decision.

Ground two of the Warilda decision was that liability can never be the consequences of hostilities or warlike operations. Hostilities are conducted by sovereigns, warlike operations are conducted by sovereigns, or by people who make a noise like a sovereign, and it is done under cloak of sovereign immunity. Anything you do in the course of hostilities carries with it no liability. The only thing which brings about liability is the ordinary civil negligence. It has to be something separate and apart from the hostilities or from the warlike operations before there can be any liability whatsoever. And the liability insurance endorsed on a marine insurance policy by the running-down clause is not affected by the exclusion from the policy of the extraordinary perils or consequences of hostilities, and any liability which there may be continues to be covered by the marine policy and, therefore, is not picked up by the policy

which insures against the risk excluded by the clause getting rid of extraordinary perils of war.

[fol. 66] That law is the settled law of England. There is no American case in conflict with it that I know of. It has been the basis of the settlement of a great many liabilities for many years, and I think it is a rule, almost a rule of property, which this Court should be very loath to disturb, in the construction of a marine insurance policy.

The Court: Was the policy the same in this case as in the English case?

Mr. Smith: The policy is the same as the standard English policy. It is a little different in a few respects from the policy before the House of Lords in the Warilda case, but it is the same as the standard basic English policy.

And if your Honor will look at the new standard policy, new standard English policy which I make reference to in my trial memorandum, which is published in A. M. C. for 1943, I think you will agree that in all material respects it is the standard English policy, and I don't think Mr. Murphy will contend that any English court, construing this language—perhaps he will, but I don't think he will contend it seriously—that any English court, construing this language, could reach a different result because of any difference in language.

There are some differences, which I say are wholly immaterial, as I shall attempt to show—all I intended to do in my trial memorandum was to state the problem and to call your attention to the basic case. I will analyze the contractual language and the language involved in the various cases which follow the Warilda in England and show you there is no difference between that language and the language in the case at bar in my full brief, which I will submit later.

[fol. 67] We have stipulated that the Worthington, the Standard Oil vessel, suffered absolutely no physical damage, for purposes of this case, and the only question before the Court is the question of whether or not the liability to the Government for having damaged a mine sweeper is covered by the policy, and, therefore, your Honor is squarely faced with the second Warilda, which I say is a bar to any recovery upon the policy or to any use of the policy as a defense to the Government's clear right to half its damages to the mine sweeper.

And unless your Honor has further questions, with that statement the Government would like to rest.

The Court: No, unless you will point out to me the difference between the English policy and the policy involved in this case, in the wording.

Mr. Smith: The only difference, I think, that is material and which Mr. Murphy will doubtless make a great deal of, is the fact that in our policy, or war risk clause—have you the stipulation there?

The Court: Yes.

Mr. Smith:—the endorsement of war risk clause, it states "It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the collision clause), in the absence of the F. C. and S. warranty contained therein but which are excluded by that warranty."

I think an attempt is going to be made, and a great deal is going to be made, of that parenthesis. I don't think it is a standard use in the English policy, to which the Warilda is applied. It has no bearing upon the second ground of the second Warilda and I don't think it has any bearing on the first ground either.

[fol. 68] Under the second Warilda decision there aren't any risks in the standard collision clause which are excluded by the F. C. and S. clause, and, therefore, there is nothing to pick up. It is precautionary, contemplating a case which nobody ever thought of, which is within the coverage, which happens to be covered, and then it will be picked up here, but it doesn't affect the result of the second Warilda.

I am not going to argue Mr. Murphy's case, because that is his case. I will let him state his own case.

Standard Oil Company of New Jersey's Preliminary Statement

Mr. Murphy: If the Court please, I would like to make a preliminary statement as to the location of this collision. I rather gathered from Mr. Smith's argument that the impression might be gained that the inland rules applied. This collision occurred on the high seas.

Mr. Smith: There is no doubt about that.

Mr. Murphy: The international rules apply. It was not in a peaceful harbor. It wasn't in a harbor of any kind.

The next preliminary remark I wish to make is, I will not devote any time to discussing the incidence of liability in this collision because that is fixed by the stipulation.

We come before the Court on an agreement that both these vessels were at fault in their navigation. I emphasize, however, the terms of the stipulation, that the fault in navigation, Article 5 of the stipulation, the fault in navigation was as follows: the aforesaid collision was contributed to both by fault in the navigation of the S.S. John Worthington and fault in navigation of the U. S. Ship YMS-12, consisting in failures on the part of both vessels to comply with applicable rules for the prevention of collision and the requirements of good seamanship under the circumstances. [fol. 69] Those last three words are very important because in those words are bound up all the points which your Honor raised in questioning Mr. Smith during his argument as to the effect of the paravanes towed by these mine sweepers.

Your Honor very well pointed out that mine sweepers, proceeding in formation, sweeping a given area, searching for enemy mines, are not engaged in anything but a warlike operation.

Your Honor also suggested, very well, and it is common sense, that the device towed on the end of the cable, the paravane, is bound to have some effect on the navigation of the ship. Its turning circle, its maneuverability, would all be affected by it.

That is the meaning of the stipulation, that both vessels failed to exercise due care and good seamanship under the circumstances. So that settles the question of liability, and it also, so far as the facts are concerned, settles the question of the connection between the warlike operation and the fact of the collision.

I am going to talk a little about the law on those facts, but I submit that this stipulation settles it that the collision was a consequence of the fact that the mine sweeper was towing a mine sweeping device, and it is also conceded by Mr. Smith that the towing of that device was a warlike operation. While he very guardedly said it is a conclusion, he said if he had to decide it, he would hold it was a warlike operation, and that is enough for me, and I will leave it there with the Court.

I come now to the contention that in some way or other, as a matter of law, this collision was not due to war risk. I think Mr. Smith has bit off more than he can chew. His [fol. 70] argument is ingenious but it is twenty-five years too late because the House of Lords in England, in the first World War, decided that a collision between a merchantman and a war vessel, in which the war vessel was a vessel then engaged on a warlike operation—it wasn't a man-o'-war, it was a steamship carrying hospital supplies, and she was a war vessel—in which the war vessel is negligent, fault on the part of the war vessel, is due to warlike operations.

The House of Lords said it was a warlike operation negligently conducted; and, again, the master may have been negligent but the dominant and efficient cause was the warlike operation.

So that the cases are absolutely settled on the point, and there is no case to the contrary, that if you have a collision between a man-o'-war, and by that I mean any vessel engaged in a warlike operation, and a merchantman, with fault on the part of the man-o'-war, whether it be the sole fault of the man-o'-war or mutual as between the two, as in this case, the collision is a consequence of the warlike operation.

Mr. Smith hasn't only put forth an argument to your Honor which runs directly counter to the settled law, but I may call your attention to the fact that a District Court in Washington, in the Ninth Circuit, which I have quoted to your Honor, in the Eastern Prince-Roustabout, very recently went all over that ground and followed that same principle. So that it is American law, as far as the cases have gone, as well as English law.

And there is another angle, which I should mention to your Honor, and that is that the Supreme Court of the United States, in The Napoli case which Mr. Smith men- [fol. 71] tioned, Mr. Justice Holmes writing, announced the principle, and it has been repeatedly stated, that in matters of marine insurance the courts of this country should follow the decisions of the House of Lords. I believe there is a qualification somewhere, unless the principle is wrong and contrary to our public policy. I think any court would apply that anyway. But, in the main, the courts of the United States are directed by the Supreme Court of the

United States to conform to the decisions of the House of Lords on marine insurance matters.

The reason is that marine insurance is so heavily placed in England and with a growing quantity of it being written in the United States, that it is commercially advisable that the decisions of the courts on matters of marine insurance on both sides of the Atlantic should be, as far as possible, uniform.

So the Western District of Washington, I believe, Judge Foley, in the case of the Eastern Prince-Roustabout, reviewed all the English law on the subject and made his decision on that basis and handed down a judgment which is perfectly correct and sound in all respects. There too there was a mutual fault case, a collision between a merchantman and a vessel engaged in a warlike operation, held war risk.

Not only does Mr. Smith dispute that principle but he argues to this court that Judge Galston, in the Eastern District of New York, in the Meseck case, also disputed that principle. I disagree with that view of Judge Galston's decision. If Judge Galston had any intention of overruling the House of Lords and disobeying the instructions of the Supreme Court of the United States, I submit that he would have made it very plain. Judge [fol. 72] Galston took full notice of the English rule, but the court must not fail to give importance to the facts that were before Judge Galston. Judge Galston was dealing with the case of a collision between a tugboat and a submarine chaser within the sheltered waters of New York harbor, and under circumstances in which the submarine chaser, while theretofore and thereafter engaged in patrolling out at sea, was, at the moment of the collision, nowheres near her station. She was preparing to go out to her station. Her maneuvers in New York harbor were the ordinary maneuvers of any other kind of vessel in the harbor. And Judge Galston, naturally, dealing with that kind of case, said: There is nothing in this case of a warlike operation and, in order to hold the war risk underwriters, if the marine underwriters are to escape liability, it must appear that the collision was a consequence of a warlike operation, and he was entirely right.

And the first Warilda and the Roanoke-Trevanion, both of which I have cited in my trial memorandum, enunciate

the English law and nobody disputes the principle, but it goes a long way to say that Judge Galston, in the case he was dealing with, meant to hold that, if there was a warlike operation and if the man-o'-war was negligent, that the collision that resulted from that was not the consequence of a warlike operation. That Judge Galston does not say. Nothing in his opinion reflects that view, and the last thing in the world Judge Galston intended to do was to set aside all the body of English law which establishes the consequential principle.

The question of proximate cause, which Mr. Smith likes to mention, is an attractive term. We hear it so often in negligence cases, but it is somewhat loosely used at times in these insurance cases because the main thing is, as laid [fol. 73] down by the English cases, that it is not the cause nearest to the loss.

Under the English law on this specific question, it is the dominant, overriding and producing cause that the House of Lords says makes the collision; although in a sense immediately due to negligence, it is nevertheless a consequence of the warlike operation, because it has resulted from a warlike operation negligently conducted.

That is what the cases say. So that is the consequential doctrine, and note, if the Court please, that the insurance policy in this case doesn't say that it is only matters of which warlike operations are the proximate cause that are covered, but it is provided, if your Honor will look at the F. C. and S. Clause, which is item 5 on page 3 of the pages I handed your Honor this morning, it is written in italics in this policy:

> "Unless physically deleted by the underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the policy:
>
> "F. C. and S. Clause. Notwithstanding anything to the contrary contained in the policy, this insurance is warranted free from any claim of loss, damage, or expense caused by or resulting from,"

and then, if you will drop down, your Honor, about five lines, you will also see "Also from all consequences of hostilities or warlike operations."

And those are the words that the House of Lords has considered over and over again, and those are the words they have construed repeatedly to cover a collision be-
[fol. 74] tween a man-o'-war and a merchantman where the man-o'-war was either solely or partially to blame.

In The Napoli case, Mr. Smith argued on the basis of what the District Court found. I believe it was Judge Hough in the District Court who found that the collision was due to negligence, but when that Napoli case got to the Supreme Court and Mr. Justice Holmes had finished with it, this matter of negligence had completely dropped out of the picture. Mr. Justice Holmes said, "We decide the case on broader grounds," and he decided that case on the ground that the collision between two merchantmen, neither of them engaged in a warlike operation, was a marine risk. Mr. Justice Holmes said,

"We must look at the cause nearest to the loss, which is a collision, which is one of the basic marine risks, and between two vessels, neither of which is engaged in a warlike operation, because the law is that a vessel sailing in convoy is not engaged in a warlike operation."

Your Honor may not like that idea and your Honor may feel there is a lot to be said against that, but the House of Lords has settled that; and in the Petersham and Matiana cases, both of them cited by Mr. Justice Holmes in the Napoli, he said, since we have a collision between vessels sailing in colliding convoys, it is a collision between vessels neither of which is engaged in a warlike operation, and the collision is due to marine risk. Question of negligence? Pay no attention to it because it is a marine risk.

But that Napolic case is by no means autnority for the proposition, which Mr. Smith always comes back to, that the negligence on the part of a vessel which is engaged [fol. 75] in a warlike operation is somehow or other an insulating factor which, in some fashion or other, cuts off the overall, overriding, consequential element of the warlike operation and which colors everything that that ship does while she is actually engaged in it.

I will leave this arm of the case with those remarks because I submit, and I really have no doubt, that this Court will hold, under the authorities, and on section 5

of this stipulation, that this collision was a consequence of a warlike operation.

(Short recess.)

Mr. Murphy: If the Court please, before I leave the first point, which is the nature of this collision, I would like to have it understood that the libel is part of the case and that I may refer, in brief, to any part of the libel that I choose, that is, it is unnecessary to offer it in evidence.

Mr. Smith: Insofar as the pleadings are agreed upon any fact, that is a fact in the case.

Mr. Murphy: Not necessarily agreed. Anything you say in your libel.

Mr. Smith: I don't think that is fair, your Honor. He would have a right ordinarily to rely upon a statement in a libel as an admission and, if it were inconsistent with the evidence, to argue that is some evidence of a contrary fact, and the Court would have to make up its mind. However, in this case we have reached a stipulation of fact which differs quite a bit from Mr. Murphy's pleadings in certain points, and the pleadings do agree on a number of points.

[fol. 76] I am perfectly willing to stipulate that that point on which the Standard Oil pleadings and the libel are in agreement, plus everything that appears in the stipulation, is before the Court, but I don't think that, in view of the fact that we are trying this without witnesses and so forth, anything which is not admitted by both sides in the pleadings is properly before the Court.

The Court: I understood that the only facts the Court was to have in this case were those facts admitted by the pleadings and those facts embraced in the stipulation and embraced in any evidence which is presented here today by documentary or oral proof. That understanding would not permit the Court to take notice of admissions in the pleadings which are not embraced in admissions by the other side.

Mr. Murphy: Then if that is so, I will read into the record certain admissions in the libel which I wish to have a part of the record because, under this stipulation, I may offer further evidence. I am now offering evidence.

Mr. Smith: I don't concede that those admissions are

the facts. After listening to them I will have to reserve my right to move for an opportunity to take further evidence.

Mr. Murphy: All I am going to read in are sworn statements made by the Government in the libel upon which this whole proceeding was opened.

I wish to read in the record these allegations from Article Third of the libel of the United States Government, verified April 24, 1944:

> [fol. 77] "Between 5:00 and 6:00 on the morning of December 16, 1942, the YMS-12 was part of a formation of three mine sweepers which were engaged in mine sweeping in a buoyed channel in the approaches to New York Harbor. The U. S. S. YMS-105 was the guide ship of the formation, which was proceeding on the easterly side of the swept channel, keeping the mid-channel buoys on the port hand. The YMS-12 was stationed several hundred yards on the starboard beam of the YMS-105 and the third vessel in the formation, the U. S. S. AMC-95 was echelon to the right of the guide ship, in a position approximately a half mile astern of and midway between the YMS-105 and the YMS-12."

That is all I wish to read.

Mr. Smith: I have no objection to that being in the record.

Mr. Murphy: At this point, if the Court please, I offer in evidence a photostat of our office copy of a letter to War Shipping Administration, Insurance Division, 99 John Street, New York, dated December 7, 1945.

The Court: That is a notice to come in and defend?

Mr. Murphy: Yes.

Mr. Smith: I have no objection to the form of the proof. I object to its introduction on the ground that it is immaterial.

The Court: Why is it immaterial?

Mr. Smith: I don't think that anybody can call upon the United States to defend a suit which the United States has brought, and I think it is a wholly useless and senseless gesture, which has no materiality.

[fol. 78] The Court: They assume that obligation by their policy.

Mr. Smith: There may be a defense to our action but nothing is added by this notice.

The Court: Mr. Murphy offers it as a part of his claim under the policy. He claims his right to be reimbursed, you being obliged to defend Standard, for costs plus expenses.

Mr. Smith: I say it is a wholly useless gesture that has no bearing because we brought the action ourselves.

The Court: Objection overruled.

(Marked Respondent's Exhibit A in evidence.)

Mr. Murphy: I also offer a photostatic copy of the reply of War Shipping Administration to that letter.

Mr. Smith: Same objection.

The Court: Let me see the reply. I will receive it in evidence and your objection is overruled.

(Marked Respondent's Exhibit B in evidence.)

Mr. Murphy: Now, if the Court please, I will take up and argue what Mr. Smith called the $64 question. In this case it is a $75,000 question. The question is whether or not Standard Oil Company of New Jersey, as owner and operator of the John Worthington, was insured against a liability to the United States for damage to a United States vessel arising from a war risk collision.

This question is novel in the United States. Mr. Smith argued it very well from his standpoint. He presented about all the points there are to be cited in support of the contention that the Second Warilda is against me. This question has been discussed up and down the street in marine insurance circles for years, and your decision will be read in a very great many important places because I [fol. 79] think it fair to say that, not only this case, but other cases may turn upon the interpretation of the Second Warilda as apply to the documents which are before this Court today in this case.

The Second Warilda—we will call it that, although, as Mr. Smith said, it was actually the third time that case came before the House of Lords. The first round, apparently, was not reported. I have never been able to find the decision, have you?

Mr. Smith: No.

Mr. Murphy: I have never been able to find the decision which fixed the basic collision liability. Apparently it was unreported. The first reported decision in the Warilda collision was the decision in which the House of Lords held that that Warilda collision was a consequence of a warlike operation. The next round was when the parties came back to the House of Lords on the question as to whether or not the liability of the owner of the Warilda to this French ship, which she had hit, the Petingaudet, was also covered by the war risk underwriters. While it is actually the third Warilda case, we will call it the second because that is what it is called all up and down the street.

There wasn't any doubt in the Warilda case that, since it was a war risk collision, and that the Crown, as war risk underwriters, was liable for damages to the Warilda. The physical damages which she sustained were clearly the consequence of war risk and covered by the Crown, but when the parties went back to their respective offices and started to adjust the collision damages, they found that not only did the physical damages sustained by the hull of the Warilda have to be taken care of, but that she was liable [fol. 80] to the Petingaudet for one-half of the Petingaudet's damages and, of course, the Warilda interests promptly made claim on the Crown, as war risk underwriter, and said, "You are liable for this too, this all arose out of this collision. This is a war risk collision and you are liable."

And that case went to the House of Lords and brought forth the Second Warilda decision, which was, as Mr. Smith stated, that while the physical damages sustained by the Warilda as a result of this war risk collision, were for account of the war risk underwriters, the liability to the other vessel arose by reason of the negligence of the captain of the Warilda and, therefore, because, under the particular documents there involved, that risk was not excluded by the F. C. and S. Clause in the marine policy, it was not picked up by the war risk underwriters, and, therefore, the War Risk underwriters were not liable for it, and, of course, it had to be borne by the marine underwriters.

In the Second Warilda the documents involved were those the court referred to as the well known T99 charter clauses Nos. 18 and 19. I tried to get a copy of those clauses and I have what purports to be a T99 charter, but Clauses 18

and 19 do not relate to that, so I cannot read it to you today, although Clauses 22 and 23 appear to be what they are talking about. I cannot read them to you today but I will get an exact copy of the clauses that were involved in the Second Warilda and see that they are put on your Honor's desk.

The Court: I would like to have them.

Mr. Murphy: You have to have those. In the report you can easily see what they are and you can easily see that they [fol. 81] are entirely different from those involved in this case by what Mr. Smith called just a small sentence, which I will come to later on, but which is one of the major differences in the case.

In the Warilda the court held, just as Mr. Smith said, that the historical development of the writing of marine insurance and marine liability policies showed that the original basic marine policy never covered the liability to the other vessel in a collision, and that it had to be supplied by an additional clause, and that was done in the beginning by an endorsement which they called the running-down clause. Later the running-down clause came to be as much of the conventional form of marine insurance policy as the adventures and perils clause. But, nevertheless, the running-down clause did not lose its identity as something attached and additional to the basic marine policy.

So the Court said that the F. C. and S. Clause, the free of capture and seizure clause, applied only to the basic clauses of the marine policy but did not apply to the additional undertaking of the underwriters to cover the liability of the insured vessel to the other ship, and that, as the F. C. and S. Clause did not exclude the liability, the war risk underwriters were not liable at all.

Right here I have to go a little bit into an explanation, if your Honor will bear with me, on the way they write a war risk policy. Your Honor might very well think that they would sit down and draw up a paragraph which would say "The undersigned hereby insures so-and-so, such-and-such a vessel, against all war risks of every nature and kind whatsoever, for a premium of so much," period. But it isn't done that way.

[fol. 82] What they do, and it is the growth of generations of underwriting, they start in and they issue a marine

policy, an ordinary marine policy, that covers the vessel against all marine risks, stranding, collision, burning.

Then, if it wasn't there already, as it is today, they used to tack on the running-down clause, which covers the assured against his liability to the other vessel.

Then if the owner wants to be insured only against war risks, they tack on an F. C. and S. Clause, which excludes from the marine policy all risks and causes of loss which are the consequences of hostilities and warlike operations. They wipe them out of the marine policy. Then they paste on a war risk rider, which says, "The undersigned will take upon themselves all risks which would have been included and covered by the marine policy were it not for the F. C. and S. Clause, but which are excluded by the F. C. and S. Clause. We take them over."

With that very brief sketch of the roundabout way they go about this sort of thing, and there is nothing old-fashioned about it because the insurance on the John Worthington was done in the same way, it may be hard to believe, your Honor. But here is a case in which the United States, under the charter, contracted to give us only war risk, that's all, and we had to attend to our marine risk affairs.

In carrying out that undertaking, the United States first issues a marine policy, including a running-down clause, and that marine policy contains the F. C. and S. Clause, which knocks all war risk out of the marine policy. Then they give us a war risk endorsement, which picks up all the war risks and they issue us a binder which says, "We will cover the war risks in accordance with the policy published."

[fol. 83] So it is so conventional as to be imbedded in the custom of the trade. We cannot do anything about that. We have to take the documents as they are.

I only wanted to give your Honor a picture of why the court in the Warilda went in such a roundabout fashion to decide that case. That is why I have to get for your Honor, and I am sorry I haven't got it, I thought I had, an exact copy of the clauses that were before the House of Lords in the Warilda, but I am prepared to hang my hat on this, that the war risk pickup in the Warilda case did not include the words that we have in this case, these words, "including the collision clause," and I will show your Honor the importance of those words in a moment.

In the Warilda, it may be clearer now if I just state it again briefly, the court said the F. C. and S. Clause applied only to the basic marine policy, it did not touch the liability, the running-down clause and, therefore, as that running-down clause risk was not excluded from the marine policy, it could never be picked up by the war risk underwriters, and, therefore, the Crown in that case was not liable.

Now we come to the documents in this case and I think your Honor will appreciate that we haven't come here to try this case before this Court on this very question, knowing full well that the Second Warilda would be urged against us—in fact, I don't think that it is going too far to say that I fully expected to hear Mr. Smith argue the case exactly as he did, and ably too, on his side of the case—without something in my locker to meet that argument, and here is what it is:

First, the F. C. and S. Clause in this case, and if your Honor will be good enough, at page 3, item 5, I have under- [fol. 84] lined it here because it is in italics in the policy, which you will find attached as Exhibit C in the stipulation, the F. C. and S. Clause runs along very nicely in the first big paragraph and excludes any risk due to all consequences of hostilities or warlike operations. So far so good.

Now I want your Honor to let me read the last clause, those last five lines:

> "If war risks are hereafter insured by endorsement on the policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

Now we have to look at the war risk endorsement which was issued. The condition has been fulfilled here "if war risks are hereafter insured by endorsement on the policy," and that condition has been fulfilled because we have a was risk endorsement. Now I ask the Court to look at the war risk endorsement, in order to see whether or not it is inconsistent with the preceding paragraph of that F. C. and S. Clause, and your Honor will find in the war risk endorsement, which is item 3 on page 2 of the paper submitted for your convenience, excerpt from war risk clauses attached to marine policy, "War risk clause"—

number blank, on that basic marine policy—"It is agreed that this insurance covers only those risks which would be covered by the attached policy"—now note the difference, your Honor—"(including the collision clause) in the absence of the F. C. and S. warranty contained therein but which are excluded by that warranty." Those are the words, your Honor, "including the collision clause." Those are the words that supply the missing link that was miss-[fol. 85] ing in the Warilda case. The House of Lords could never have reached the decision it did if it had had that policy, that form of policy, before it, because, not only is it expressly provided in the war risk endorsement that risks covered by the collision clause, which is the running-down clause we have been talking about—your Honor will find it in the main policy, and I have quoted in item 4 the pertinent provision of the collision clause—not only is it provided in the war risk endorsement that the endorsement covers the collision clause liability, but it was also provided in the F. C. and S. clause that the F. C. and S. clause would be subject to the war risk endorsement and superseded by the war risk endorsement insofar as the war risk endorsement was inconsistent with the terms of the F. C. and S. clause.

I submit, therefore, that your Honor must read the F. C. and S. clause as including the words, "including the collision clause," and, therefore, the basic stone of the Warilda case, which was that the F. C. and S. clause did not exclude the liability risk, is done away with here because the F. C. and S. clause here must be read as excluding the collision risk, and that once excluded by the F. C. and S. clause, it is picked up by the war risk endorsement and the United States is liable as the war risk underwriter.

While a great deal may be said about the Second Warilda pro and con, it was a divided court. The House of Lords divided three to two. It is a matter of passing interest that Sir Edward Carson, then Lord Carson, who led the dissent, wrote a very powerful opinion in which he expressed a very strong view that, in a war risk collision, where the Crown is unquestionably liable for the [fol. 86] physical damages to the Warilda and it isn't liable at all for the liability to the other vessel simply because the master was negligent, is nonsense. He didn't use that word but the whole tone of his opinion is to that effect, that is to say, it wasn't a war risk because the master is negli-

gent on both legs of the case, that is, if he is negligent as to damages to his own vessel, he is negligent as to the damage to the other vessel. The fact that he is negligent as to the damages to his own vessel does not prevent recovery from the Crown on damages sustained by their own vessel, and why should it prevent recovery of liability over on the other side? That was the dissent. Three judges did not agree with him.

But however your Honor feels about the Warilda, your Honor doesn't have to say "I overrule the Warilda," or "I won't follow it," because it is abundantly clear that the Warilda does not apply to this case any more than the rule in Shelley's case does, because the facts are different and the documents are so radically different that no one could possibly miss it, because the very point was, in the Warilda case, that the running-down liability was not excluded by the F. C. and S. Clause, and if it is not excluded, it cannot be picked up by an endorsement which says, "We take only what is excluded." That is the Warilda. Here we have an endorsement that says "We take the risks excluded in the body of the policy, including the collision clause."

We have, what I will call for lack of a better term, a subordination clause; the last paragraph which I read to your Honor, which says "This clause shall be superseded by the war risk endorsement to the extent that the war risk endorsement is inconsistent with the foregoing." [fol. 87] I say the war risk endorsement is inconsistent with the foregoing by the very terms of those words in parenthesis, "including the collision clause." Therefore the F. C. and S. Clause is superseded or must be deemed to include the words "including the collision clause." Therefore, the liability risk is excluded from the marine policy and is picked up by the war risk covered by the United States.

The question, therefore, while novel, I am confident will not cause your Honor any difficulty whatever because the documents are plain.

I am happy to think that this question is going to be decided because it has been discussed long enough, and it is high time that the conflicting views on the subject were settled once and for all.

I now come to one angle, your Honor, which is founded on these exhibits. Your Honor will find in Exhibit B a

statement by the chief adjuster of the Division of Wartime Insurance, in which they refused to come in and defend. They made a very interesting statement. They said that "if you are entitled to recover under the war risk insurance, then the principal claim is waived." I offer that as settling the question as to whether or not there is any theoretical right of the United States to a decree under the collision libel for half of their damages, even though we are entitled to recover under our war risk insurance. I submit that under that letter, which undoubtedly follows the well known interdepartmental waiver, which was promulgated by the Government during the war, and which says "There will be no recovery by one arm of the government against another," that the Government's claim with respect to Y. M. S.-12 is waived, that is, that the claim of the Government against Standard Oil, operating under [fol. 88] the Navy, which is covered as war risk underwriter of Standard Oil of New Jersey, must be waived. Therefore when your Honor determines that this claim of Standard Oil Company against the United States, as war risk underwriter, is covered by the war risk insurance, I ask your Honor also to rule that, by the same token, as the claim is recoverable from the United States by Standard Oil, the claim of the United States against Standard Oil, which is covered by the Government insurance, must be deemed waived under the exhibit there issued by the Division of Wartime Insurance.

The Court: I think that follows, Mr. Smith, doesn't it?

Mr. Smith: I am not in practice for costs and I don't think it makes any difference.

The Court: There is only one question, as to what the amount of expenses was.

Mr. Murphy: That is right, and, as to that, your Honor will send that to a commissioner. We haven't come prepared to prove anything along that line. As a matter of fact, no damages have been——

The Court: You don't know what they are going to be.

Mr. Murphy: We do not know what they are going to be, and the client hasn't sustained any loss in that respect yet.

The Court: Your damages would be determined at the end of this case.

Mr. Murphy: I think, therefore, your Honor, that concludes what I have to say.

COLLOQUY

Mr. Smith: There is one point Mr. Murphy raised which I would like to emphasize again. If you decide in the Government's favor, it make- it unnecessary to get into this second Warilda question. Mr. Murphy has made a great [fol. 89] to-do about the phrase "under the circumstances," in Article 5 of the stipulation. I want to emphasize over and over again that there is absolutely no proof in this case that the fact that we were carrying a paravane at the end of a wire, or that we were traveling in formation, had any causal effect on this collision. The collision occurred while we were doing those things but there isn't a scintilla of proof that those factors in any way impeded our navigation or in any way affected what we did.

The only proof in this case is the stipulation that it occurred because of failure to comply with rules for the prevention of collisions and the practice of good seamanship under the circumstances, and there is no proof that, under the circumstances, the fact that we were towing a mine sweep and traveling in convoy had any bearing whatsoever or causal relation to the collision.

The second point I want to make, on the basis of what Mr. Murphy has said, is this: Mr. Murphy has taken the position that the American case law is in accord with the British case law, and I want to emphasize that I very fundamentally disagree with him, if by the British case law you include all the cases and all the language in the British cases. There is in the British case law language which some people have referred to as the so-called umbrella theory of causation. That is this: that everything that a vessel does in the course of a war operation is, for purposes of insurance, caused by the war operation, and the British cases have also found that supplying a war base with supplies of materiel and munitions is a warlike operation, and there is language which tends to indicate that negligence in ordinary seamanship on a ship bound to a war base with war supplies is the result of the operation of supplying the base with war material.

[fol. 90] We say as to that that the American case law is well settled to the contrary and we propose to produce in the principal brief a large number of cases in the Court of Claims and the Supreme Court in which the American case law, before these English cases were decided, definitely con-

cluded that all operations of a vessel engaged in military operations were not caused by a military operation and are not coverable by war risk assumptions of the Government.

Did you have a question on that phase of the matter?

The Court: No, you have cleared it up for me.

Mr. Smith: We say that the American law diverges from what became the British law before the British law was enunciated——

The Court: You don't like the first Warilda?

Mr. Smith: No, I like the second.

Mr. Murphy: And Mr. Murphy says he likes the first and he doesn't care about the second——

Mr. Smith: That is right.

The Court: —because it is not applicable.

Mr. Murphy: That is right.

Mr. Smith: I say the first Warilda was not applicable either. Let me go on a step further. I say, not only did the American law diverge from the British law, from what became the British law before the British law was enunciated in the Second Warilda and similar cases at the end of the first World War, but the whole basis for the public policy which was adverted to by Judge Holmes in the Supreme Court decision in The Napoli, of keeping a uniformity between British and American commercial practice with respect to marine insurance matters, has been destroyed by the action of the British marine insurance market [fol. 91] in adopting the F. C. and S. Clause, which radically differs from the F. C. and S. clause used here, and which expressly provides that collisions occurring in the course of war operations are not to be within war risk coverage but are to be within marine risk coverage. And I have cited in my trial memorandum a reference to the American maritime cases which prints the new clause and the announcements of British underwriters, showing it is one of universal application.

So the argument that, for reasons of commercial policy, we must disregard the American cases and adopt some language in the British cases, from which you may set up this umbrella theory of causation, is no longer of any validity. The British market has repudiated the commercial policy as enunciated in the first Warilda.

The Court: Is there any announcement by the Supreme Court showing the change of view?

Mr. Smith: No; I say that the British commercial market——

The Court: No. Is there any announcement by the Supreme Court that shows or indicates that the English law should no longer be followed?

Mr. Murphy: No, sir.

Mr. Smith: No. I say the Supreme Court has never adopted the English law on this question. The Supreme Court, in every case in which the matter has been before it, has reached results which I think are utterly inconsistent with the English law as it was finally developed, and there is no ground of public policy pointing to a need to have uniform commercial practice because the English insurance field has repudiated the whole doctrine of the first Warilda.

[fol. 92] Mr. Murphy: But that was in 1943, after the collision. That does not apply to this case.

Mr. Smith: It applies today, if you are talking about questions of public policy.

My next point is that Mr. Murphy's whole argument with respect to the difference in the documents before the Court in the Second Warilda and in this case hinges upon his argument that in this case we have excluded from the risks covered by the ordinary marine policy the risks included in the collision clause. I just do not see how he can make that argument.

The language he relies on reads:

> "It is agreed that this insurance covers only those risks which would be covered by the attached policy."

Well, the attached policy includes the collision clause and there is a parenthesis in there, "It is agreed that this insurance covers only those risks which would be covered by the attached policy, including the collision clause in the absence of the F. C. and S. warranty contained therein but which are excluded by that warranty."

There is nothing in that language which excludes any risk. That is language which says, "This insurance covers all of the risks covered by a marine policy, which they issued in usual form, including the running-down clause and which are excluded by another clause," and there is nothing about the running-down clause in the exclusionary provisions of the F. C. and S. Clause, nothing whatsoever,

and how Mr. Murphy reaches the result that there is something in this language, which defines the basic policy, which has any exclusionary effect, I am utterly unable to follow.

[fol. 93] Mr. Murphy: Will the Court allow me to keep the record open for the purpose of obtaining and putting in evidence a copy of the clauses which were involved in the Second Warilda?

The Court: I don't think that should become part of the record.

Mr. Murphy: Very well.

The Court: Annex it to your brief.

Mr. Murphy: I will annex it to my brief then.

The Court: Yes; I don't think it is any part of the evidence in this case.

Mr. Smith: I don't think so, either.

The Court: You may submit it to me in order to permit me to understand and appreciate what was involved.

Mr. Murphy: All right. In that event, we rest.

The Court: And there is just one thought I had in mind. I dislike to take these cases on an agreed state of facts. We haven't really an agreed state of facts. There is no dispute on the facts?

Mr. Smith: I don't think so.

Mr. Murphy: Not on the facts.

The Court: Wouldn't it be better for counsel to prepare and agree upon a set of findings of fact and have them marked in evidence as part of the stipulation, and upon those findings of fact I can draw my own conclusions of law?

Mr. Smith: Well, I think——

The Court: It would save some work and I think it would be better for everybody, in the preparation of your briefs. I think it would help you in your briefs.

Mr. Smith: I am perfectly willing to attempt to do that. We had a great deal of difficulty reaching the present stipulation.

[fol. 94] The Court: If you had great difficulty in arriving at what the facts are, how can I do it? You do not raise any issue of fact here, either side?

Mr. Smith: I don't think there is any issue of fact. He has the burden of proof——

The Court: If there is no issue on the facts, why can't you agree on findings of fact?

Mr. Murphy: I will start out, copying from the stipulation and the libel as I read it today.

Mr. Smith: I have no objection.

Mr. Murphy: And I will ask your Honor to find these letters are binding.

The Court: Suppose, after you do that, you send it to counsel and get his consent?

Mr. Smith: Will there be conclusions?

The Court: No, conclusions of law are for the Court.

Mr. Smith: The basic facts I do not think are in dispute.

The Court: I would like to have it embodied at length in a set of findings and have it consented to.

Mr. Smith: Perfectly willing to do it.

The Court: If you will need more time for your briefs, take another week to get that done. I think that should be done first, before you draw your briefs. I think it would be much more helpful.

Mr. Murphy: All right, sir, and we will set forth in the facts what each side wishes to quote from the documents, because those are facts.

The Court: You have no proof of any facts not embodied in this stipulation, so you won't have this case sent back from the Circuit Court for further hearing on the ground that they find there aren't enough facts.

[fol. 95] GOVERNMENT'S EXHIBIT 1

STIPULATION OF FACTS, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 131-151

Stipulation

A. 153-203

UNITED STATES OF AMERICA, as Owner of United States Ship YMS-12, Libelant,

against

STANDARD OIL COMPANY OF NEW JERSEY, Respondent

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker John Worthington, Libelant,

against

UNITED STATES OF AMERICA, Respondent

It Is Hereby Stipulated by and Between the Parties That:

[fol. 96] (1) At all material times the United States of America owned and operated the United States Ship YMS-12, a mine sweeper of the United States Navy, manned and commanded by United States Naval personnel, and Standard Oil Company of New Jersey owned and operated the Steamship John Worthington, a tank ship.

(2) Between 5:00 and 6:00 A. M. on December 16, 1942, a collision occurred between United States Ship YMS-12 and SS John Worthington in a buoyed channel otherwise known as the swept channel in the approaches to New York harbor.

(3) At the time of the collision the YMS-12 was part of a mine sweeping formation and was proceeding seaward with her mine sweeping gear streamed and displayed three all around green lights designating mine sweeping vessels towing mine sweeps in accordance with notice to mariners issued July 1, 1942, in addition to her regular running lights.

(4) At the time of the collision, SS John Worthington was outbound from New York in ballast and was proceeding to sea in convoy, displaying regular and proper lights. The weather was clear, visibility good.

(5) The aforesaid collision was contributed to both by fault in the navigation of SS John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with applicable rules for the prevention of collisions and the [fol. 97] requirements of good seamanship under the circumstances.

(6) SS John Worthington did not sustain any physical damage but the YMS-12 did sustain damage as a result of the collision.

(7) At the time of the collision SS John Worthington was operating pursuant to a time charter party between the United States of America and Standard Oil Company of New Jersey, duly executed and in force at all material times. A true copy thereof is hereunto annexed, marked Exhibit A.

(8) Standard Oil Company of New Jersey was insured by the United States of America against specified war risks with respect to SS John Worthington and a binder of insurance in the form hereunto annexed, marked Exhibit B, was issued by United States of America to Standard Oil Company of New Jersey and was in force at the time of the collision. A true copy of the full form of standard marine and war risk policy of War Shipping Administration, including the war risk clauses annexed thereto referred to in said binder and charter, in effect at all material times, is printed at pages 586 to 595 inclusive of the Compilation of Standard Contract Forms of the War Shipping Administration, published in 1945 by the Government Printing Office, and a photostat copy thereof is hereto annexed, marked Exhibit C.

(9) Standard Oil Company of New Jersey duly performed all the terms and conditions of said charter party [fol. 98] and insurance contract on its part to be performed and did not carry any other insurance as to SS John Worthington.

(10) Either party may offer further evidence at the trial, but neither shall comment on non-production of witnesses by the other.

Dated, October 5, 1948.

John F. X. McGohey, United States Attorney, Proctor for the United States of America, by Edward L. Smith, Kirlin, Campbell, Hickox & Keating, by E. S. Murphy, Proctors for Standard Oil Company of New Jersey.

[fol. 99] EXHIBIT 1(a)

Excerpts from Exhibit 1 (a), the full text to be handed by appellant to the Court on argument of this appeal.

"Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto;

* * * * * * *

Except as to risks or liabilities assumed, insured or indemnified against by the Charterer pursuant to this Charter, unless otherwise agreed, the Owner shall assume or insure against all other risks or liabilities of whatever nature including without limitation those of a Marine Hull and P. and I. nature and such Hull and P. and I. coverage shall also protect the interests of the Charterer to the extent of the liability it would have if it were the owner of the Vessel."

[fol. 100] EXHIBIT 1(b)

This exhibit is identical with Schedule A annexed to Answer of Standard Oil Company of New Jersey printed *ante*, pp. 24-27 inclusive.

[fol. 101] EXHIBIT 1(c)

Excerpts from Exhibit 1(c), the full text to be handed by appellant to the Court on argument of this appeal.

"Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

* * * * * * *

"Adventures and perils. Touching the Adventures and Perils which the Assurers are content to bear and take upon themselves, they are of the Seas, Men-of-War, * * * and of all other like Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the Said Ship, etc., or any part [fol. 102] thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the policy or by endorsement."

* * * * * * *

"Full collision—Sister-ship collision. And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons

any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *"

"War Risk Clauses

Endorsement to be attached to and be made a part of Policy No. ——.

It is agreed that this insurance covers only those risks which would be covered by the attached policy [fol. 103] (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not, and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding arrest, restraint, or detainment under customs or quarantine regulations, and similar arrests, restraints, or detainments not arising from actual or impending hostilities or sanctions. * * *"

[fol. 104] GOVERNMENT'S EXHIBIT 3

Notice to Mariners and Stipulation amending said exhibit.

UNITED STATES COAST GUARD

ECM:LK No. 136
14 August, 1945

NOTICE TO MARINERS

Issued by the District Coast Guard Officer, Third Naval District

Address: 42 Broadway, N. Y. 4, N. Y. Phone: Whitehall 3-2300, Ext. 86.

New York Harbor Approach—Temporary Lighted Buoys Maintained

The following temporary lighted buoys exist in the following locations. All buoys show short long flashing white lights except Buoy G, which shows quick flashing white. Intensity of lights 130 C. P. except Buoy A which shows 300 candlepower.

Fairway Lighted Whistle Buoy A—40-04-50 N—73-31-45 W.
Fairway Lighted Whistle Buoy B—40-06-36 N—73-35-43 W.
Fairway Lighted Whistle Buoy C—40-08-30 N—73-39-34 W.
Fairway Lighted Whistle Buoy D—40-10-42 N—73-42-40 W.
Fairway Lighted Gong Buoy E—40-13-06 N—73-45-54 W.
Fairway Lighted Bell Buoy F—40-16-44 N—73-47-27 W.

[fol. 105]

Fairway Lighted Bell Buoy G—40-20-09 N—73-48-54 W.
Fairway Lighted Bell Buoy H—40-23-26 N—73-50-23 W.
Fairway Lighted Bell Buoy I—40-26-26 N—73-51-51 W.

New York Harbor Approach—Danger Area

There will be gunfire in New York Harbor and the approaches thereto between 0900 and 1700 during the period 14-21 August, 1945. The firing area which will be unsafe for shipping for the period indicated, will be bounded by the lines joining: Cupola, Rockaway Point Coast Guard Station, Sandy Hook Point Light, Monmouth Beach Tower, point at 40°20′ North, Longitude 73°70′ West, Point at

Latitude 40°25′ North, Longitude 73°40′ West, Tower at Point Lookout, L. I., N. Y. Firing will be suspended while ships are in the vicinity of firing.

Stanley V. Parker, District Coast Guard Officer, Third Naval District.

C&GS Charts:
1215, 1108; 1215.

Mariners are requested to notify the District Coast Guard Officer of the appropriate Naval District, directly, of any defect in or misplacement of an aid to navigation. Messages may be sent by telegraph, collect. Such notification will assist materially in the prompt correction of defects and in the effective maintenance of aids to navigation.

Please Post Conspicuously

[fol. 106] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 131-151

A. 153-203

[Same Titles]

STIPULATION

It is hereby stipulated that United States Exhibit 3 in this matter is hereby amended in so far as said exhibit is inconsistent with the information contained in the attached letter from the Commandant of the Third Coast Guard District to proctors for Standard Oil Company of New Jersey, dated October 18, 1948.

Dated October 19, 1948.

John F. X. McGohey, United States Attorney, Proctor for the United States of America, By Kirlin Campbell Hickox & Keating, By Proctors for Standard Oil Company of New Jersey.

[fol. 107] Address reply to Commander, 3rd CG District.
And refer to 42 Broadway, New York, N. Y.

18 October 1948
File:dli 626

Kirlin, Campbell, Hickox and Keating, 120 Broadway,
New York 5, N. Y.

Att: R. T. Greene, Esq.

Re: USS YMS—12—SS. John Worthington.

DEAR SIR:

The records of the District office indicate that on 16 December 1942 the locations of the Swept Channel Buoys for the New York approach were as follows:

a. Fairway Lighted Whistle Buoy A—Lat. 40°04′50″N
Long. 73°31′45″W

b. Fairway Lighted Whistle Buoy B—Lat. 40°06′36″N
Long. 73°35′43″W

c. Fairway Lighted Whistle Buoy C—Lat. 40°08′26″N
Long. 73°39′35″W

[fol. 108]

d. Fairway Lighted Whistle Buoy D—Lat. 40°10′42″N
Long. 73°42′50″W

e. Fairway Lighted Gong Buoy E —Lat. 40°13′06″N
Long. 73°45′51″W

f. Fairway Lighted Bell Buoy F —Lat. 40°16′44″N
Long. 73°47′32″W

g. Fairway Lighted Bell Buoy G —Lat. 40°20′09″N
Long. 73°48′54″W

h. Fairway Lighted Bell Buoy H —Lat. 40°23′26″N
Long. 73°50′23″W

i. Fairway Lighted Bell Buoy I —Lat. 40°26′46″N
Long. 73°51′51″W

By direction of the District Commander.
(Signed) W. L. Maloney, Commander, U. S. C. G.,
Chief, Legal Section.

[fol. 109] RESPONDENT'S EXHIBIT "A"

Letter to War Shipping Administration, Insurance Division, dated December 7, 1945.

December 7, 1945.

War Shipping Administration, Insurance Division, 99 John Street, New York, N. Y.

S.S. John Worthington—U.S.S. Y.M.S.-12
Collision December 16, 1942

DEAR SIRS:

On June 5, 1944 United States of America, as owner of the United States Ship Y.M.S-12 filed a libel against Standard Oil Company of New Jersey claiming damages in the sum of $150,000 by reason of collision between the Y.M.S.-12 and the Steamship John Worthington on December 16, 1942.

Standard Oil Company of New Jersey has referred the matter to us. We have advised our client that any liability on its part or on the part of the John Worthington is covered by insurance of United States of America, War Shipping Administration, in accordance with Clause 20 of the Warshipoiltime charter of the John Worthington, including the terms of the war risk binder issued to Standard Oil Company of New Jersey with respect to said steamship.

[fol. 110] On behalf of Standard Oil Company of New Jersey we ask your consent, as war risk underwriter, that this case be defended for your account. You are hereby notified that Standard Oil Company of New Jersey will look to you for full indemnity as to any and all liability for damages sustained by the Y.M.S.-12 or by the United States by reason of said collision together with all costs and expenses incurred by Standard Oil Company of New Jersey in the defense of said action.

Very truly yours, Kirlin, Campbell, Hickox & Keating, by ——.

ESM:J.
41637.

[fol. 111] RESPONDENT'S EXHIBIT "B"

Letter to Kirlin, Campbell, Hickox & Keating, dated December 14, 1945.

War Shipping Administration
99 John Street,
New York 7, New York

December 14, 1945.

Messrs. Kirlin, Campbell, Hickox & Keating, 120 Broadway, New York 5, N. Y.

Attention: Mr. Edwin S. Murphy

GENTLEMEN:

John Worthington—12/16/42—WH-4759, Chg.

Please refer to your letter of December 7.

We regret to advise that there is nothing contained in the one letter received from the Owners, under date of January 12, to indicate that we, as war risk underwriters, are concerned in any of the damages arising out of the collision. Furthermore, it is our view that the war risk protection afforded this vessel under the charter does not include claims under the Running Down Clause. It should also be borne in mind that any claim or suit by the United States of America, as Owners of the ship Y.M.S.-12, in which we might prove to be concerned, would be waived.

In the circumstances, the defense of the suit would appear to be solely for the account of the Owners of the John Worthington and we presume that you will be guided by their instructions.

Very truly yours (Signed) W. H. Cantwell, Acting Chief Adjuster, Division of Wartime Insurance.

[fol. 112] DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Admiralty

A. 131-151

UNITED STATES OF AMERICA, as Owner of United States Ship YMS-12, Libelant,

against

STANDARD OIL COMPANY OF NEW JERSEY, Respondent

A. 153-203

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker John Worthington, Libelant,

against

UNITED STATES OF AMERICA, Respondent

Appearances:

John F. X. McGohey, Esq., United States Attorney Proctor for United States of America;

By: Edward L. Smith, Esq., Special Assistant Attorney General, and

Louis Greco, Esq., Special Attorney.

[fol. 113] Kirlin, Campbell, Hickox & Keating, Esqs., Proctors for Standard Oil Company of New Jersey;

Edwin Murphy, and Raymond T. Greene, Esqs., of Counsel.

RYAN, *J.*:

These suits in the admiralty arise from a collision on the morning of December 16, 1942, between the United States Navy Ship YMS-12 and the steam tanker John Worthington, at sea in a buoyed channel in the approaches to the New York harbor.

The YMS-12 alone sustained collision damage.

The S.S. John Worthington, at the time of the collision, was being operated under the terms of a charterparty to the Government.

In one suit, the United States in a collision libel filed as owner of the YMS-12 sues the Standard Oil Company of New Jersey (hereafter, Standard Oil), as owner and operator of the S.S. John Worthington, for damages sustained by the YMS-12. The answer interposed pleads an affirmative defense based on the war risk insurance provided by the Government under Clause "20" of the charter-party.

In the second suit, Standard Oil sues the United States upon the contract of war risk insurance for any sum which Standard Oil may be held liable to pay in the collision action, and the expenditures necessarily incurred in the defense of that action.

The following findings of fact are made with the consent of all parties by stipulation; no issue of fact remains for determination by the court; all questions of fact have been resolved.—

[fol. 114] (1) At all material times the United States of America owned and operated the United States Ship YMS-12, a mine sweeper of the United States Navy, manned and commanded by the United States Naval personnel, and Standard Oil Company of New Jersey owned and operated the Steamship John Worthington, a tank ship.

(2) Between 5:00 and 6:00 a.m. on December 16, 1942, a collision occurred between the United States Ship YMS-12 and S.S. John Worthington in buoyed channel otherwise known as the swept channel in the approaches to the New York harbor. Said channel was marked by center line buoys from a point about twenty-three miles off Point Pleasant on the New Jersey Coast at Buoy A. Lat. 40 deg. 04′ 50″ N; Long. 73 deg. 31′ 45″ W, to a point in vicinity of Ambrose Light Vessel, at Buoy I, Lat. 40 deg. 26′ 46″ N; Long. 73 deg. 51′ 51″ W.

(3) At the time of the collision the YMS-12 was part of a mine sweeping formation and was proceeding seaward with her mine sweeping gear streamed and displaying three all around green lights designating mine sweeping vessels towing mine sweeps in accordance with notice to mariners issued July 1, 1942, in addition to her regular running lights. Said mine sweeping formation consisted of three mine sweepers which were engaged in mine sweep-

ing in said buoyed channel. The USS YMS-105 was the guide ship of the formation, which was proceeding on the easterly side of the swept channel, keeping the mid-channel buoys on the port hand. The YMS-12 was stationed several [fol. 115] hundred yards on the starboard beam of the YMS-105 and the third vessel in the formation, the USS AMC-95, was echelon to the right of the guide ship in a position approximately a half mile astern of and midway between the YMS-105 and the YMS-12.

(4) At the time of the collision, SS. John Worthington was outbound from New York in ballast and was proceeding to sea in convoy, displaying regular and proper lights. The weather was clear, visibility good.

(5) The aforesaid collision was contributed to both by fault in the navigation of SS. John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances.

(6) SS. John Worthington did not sustain any physical damage but the YMS-12 did sustain damage as a result of the collision.

(7) At the time of the collision SS. John Worthington was operating pursuant to a time charter party between the United States of America and Standard Oil Company of New Jersey, duly executed and in force at all material times. Said time charter party contained among others, the following provisions:

> [fol. 116] "Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto;
>
> * * * * *

Except as to risks or liabilities assumed, insured or indemnified against by the Charterer pursuant to this Charter, unless otherwise agreed, the Owner shall assume or insure against all other risks or liabilities of whatever nature including without limitation those of a Marine Hull and P. and I. nature and such Hull and P. and I. coverage shall also protect the interests of the Charterer to the extent of the liability it would have if it were the owner of the Vessel."

(8) At the time of the collision Standard Oil Company of New Jersey was insured by the United States of America against specified war risks with respect to SS. John Worthington and a binder of insurance was issued by United States of America to Standard Oil Company of New Jersey and was in force at the time of the collision. Said binder of insurance contained, among others, the following provisions:

[fol. 117] "War Risks Binder R.C. No. 401

Covering Vessels
Requisitioned by the

War Shipping Administration
Division of Wartime Insurance
Washington, D. C.

The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below:

Assured: Standard Oil Company of New Jersey.
Address: 30 Rockefeller Plaza, New York, New York.
Vessel: John Worthington. Flag: U.S.
From: Time of delivery to War Shipping Administration about April 22, 1942.
To: Termination of charter.

1. Hull.,
DWT 12475 Speed 10.8 Knots Date Built 1920 Value $935,625.
Amount $935,625.

* * * * * * *

"3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. * * * "

(9) Endorsement No. 1 to said war risk binder issued by the United States of America contained, among others, the following provisions:

[fol. 118] "2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto."

(10) The full form of standard marine and war risk policy of War Shipping Administration, including the war risk clauses annexed thereto, referred to in said binder and charter, in effect at all material times, contained, among others, the following provisions:

"Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.

[fol. 119] *If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."*

* * * * * * *

"Adventures and perils. Touching the Adventures and perils which the Assurers are content to bear and take upon themselves, they are of the Seas, Men-

of-War, * * * and of all other like Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the Said Ship, etc., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the policy or by endorsement."

* * * * * * *

"*Full collision—Sister-ship collision.* And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the [fol. 120] Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *"

(11) The war risk clauses of said full form of standard marine and war risk policy of War Shipping Administration contained, among others, the following provisions:

"War Risk Clauses

Endorsement to be attached to and be made a part of Policy No. ——.

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not, and/or military or naval aircraft and/or other engines of war including missiles [fol. 121] from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding arrest, restraint, or detainment under customs or quarantine regulations, and similar arrests, restraints, or detainments not arising from actual or impending hostilities or sanctions. * * *"

(12) Standard Oil Company of New Jersey duly performed all the terms and conditions of said charter party and insurance contract on its part to be performed and did not carry any other insurance as to SS. John Worthington.

(13) On December 7, 1945 proctors for Standard Oil Company of New Jersey wrote a letter to War Shipping Administration, Insurance Division, 99 Johns Street, New York, N. Y. as follows:

"December 7, 1945.

War Shipping Administration, Insurance Division, 99 John Street, New York, N. Y.

S.S. John Worthington—U.S.S. Y.M.S-12

Collision December 16, 1942

DEAR SIRS:

On June 5, 1944, United States of America, as owner of the United States Ship Y.M.S.-12 filed a libel against [fol. 122] Standard Oil Company of New Jersey claiming damages in the sum of $150,000 by reason of collision between the Y.M.S.-12 and the Steamship John Worthington on December 16, 1942.

Standard Oil Company of New Jersey has referred the matter to us. We have advised our client that any

liability on its part or on the part of the John Worthington is covered by insurance of United States of America, War Shipping Administration, in accordance with Clause 20 of the Warshipoiltime charter of the John Worthington, including the terms of the war risk binder issued to Standard Oil Company of New Jersey, with respect to said steamship.

On behalf of Standard Oil Company of New Jersey we ask your consent, as war risk underwriter, that this case be defended for your account. You are hereby notified that Standard Oil Company of New Jersey will look to you for full indemnity as to any and all liability for damages sustained by the Y.M.S.-12 or by the United States by reason of said collision together with all costs and expenses incurred by Standard Oil Company of New Jersey in the defense of said action.

Very truly yours, Kirlin, Campbell, Hickox, & Keating. By: —— ——"

ESM:J.

[fol. 123] (14) On December 14, 1945 War Shipping Administration, 99 John Street, New York 7, N. Y., wrote a letter to the proctors for Standard Oil Company of New Jersey, which was received by the latter December 21, 1945 as follows:

"Messrs. Kirlin, Campbell, Hickox & Keating, 120 Broadway, New York 5, N. Y.

December 14, 1945.

Attention: Mr. Edwin S. Murphy

GENTLEMEN:

John Worthington—12/16/42—WH-4759. Chg.
Please refer to your letter of December 7.

We regret to advise that there is nothing contained in the one letter received from the Owners, under date of January 12, to indicate that we, as war risk underwriters, are concerned in any of the damages arising out of the collision. Furthermore, it is our

view that the war risk protection afforded this vessel under the charter does not include claims under the Running Down Clause. It should also be borne in mind that any claim or suit by the United States of America, as Owners of the ship Y.M.S.-12, in which we might prove to be concerned, would be waived.

In the circumstances, the defense of the suit would appear to be solely for the account of the Owners of [fol. 124] the John Worthington and we presume that you will be guided by their instructions.

Very truly yours, (signed) W. H. Cantwell, Acting Chief Adjuster, Division of Maritime Insurance."

We come now to a consideration of the conclusions of law to be drawn from these facts—

(1) Both vessels being at fault, Standard Oil is liable to the Government for one half of the collision damages to YMS-12.

We have next to determine whether under the terms of the charter party and the risks assumed and insured against by the Government as war risk underwriter, this claim for one half the collision damages of the YMS-12 may be successfully maintained against Standard Oil.

The Government by the charter party accepted the war risks, requiring Standard Oil to assume sea risks ordinarily covered by the usual marine policy insuring against marine perils. The effect is to make the Government responsible for the risks of war as would be excluded by the F. C. & S. warranty, including all consequences of hostilities or warlike operations.

(2) The YMS-12 was actually engaged in a warlike operation at the time of collision.

Whether a vessel is engaged in a warlike operation is essentially a question of fact. *Board of Trade* v. *Hain* [fol. 125] *Steamship Company,* (1929) A. C. 534, 538. We have found that the YMS-12, at the time of the collision, "was part of a mine sweeping formation and was proceeding seaward with her mine sweeping gear streamed," and this in the swept channel in the approaches to the New York harbor in time of war. Warlike operations are not to be confined to immediate attack upon the enemy. During war

almost any movement of a war vessel in the course of her duties exercised in a war area is included; warlike operations include and cover operations defensive as well as offensive in character. *The Petersham and Matiana* (1921) 1 A. C. 99, 114. Mine sweeping conducted by a belligerent in the waters of the channels in the approaches to a great harbor of the belligerent is most certainly a warlike operation.

(3) The collision was a consequence of the warlike operation of YMS-12.

We have found that the collision was contributed to by the negligence and fault of both vessels "under the circumstances."

Faulty navigation on the part of YMS-12 does not change the character of its operations, nor does it render the collision any the less a consequence of a warlike operation.

> "Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that [fol. 126] category must continue to attach, although those movements had an element of negligence in their operations." *Attorney General* v. *Adelaide Steamship Company, Ltd.*, (1923) A.C. (*The Warilda*) 292, 300.

In spite of the negligence on the part of both vessels involved herein the operation of YMS-12 continued to be a warlike operation even though negligently performed. *Board of Trade* v. *Hain Steamship Company, supra*, 539.

> "* * * when the voyage itself is a warlike operation, the importance of a manoeuvre by the vessel to bring about a warlike operation largely disappears."
>
> *Athel Line, Ltd.* v. *Liverpool & London War Risks Insurance Association, Ltd.* (C.A. 1945) 1 K.B. 117, 120.

Of course, as Viscount Simon, L. C. observed in *Yorkshire Dale St-amship Company, Ltd.* v. *Minister of War Transport* (*The Coxwold*) (1942) A. C. 691, 696.

> "This, however, is an entirely different thing from saying that any and every accident which happens to such a ship during her voyage is the consequence of a warlike operation. • • • Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence "of" a warlike operation merely by showing that it happened 'during' a warlike operation." (697)

Lord Sumner in *Attorney General* v. *Adelaide Steamship Company, Limited* (*The Warilda,*) *supra,* (at p. 305) puts [fol. 127] it to a true test when he asks whether the collision is caused "effectively and proximately" by the warlike operation. The dictum of Roche, J. in the *Charante Steamship Co.* v. *Director of Transports,* 38 Times L. R. 148, 149; aff'ed 38 Times L. R. 434, that "Where, . . . an essential and necessary part of the direct and immediate cause of a loss was a warlike operation, whether well or ill conducted, the loss was a consequence of hostilities," is cited with approval in *Attorney General* v. *Adelaide Steamship Company, Ltd.* (*The Warilda*), *supra* (305), and again in *Yorkshire Dale Steamship Company, Ltd.* v. *Minister of War Transport* (*The Coxwold*), *supra* (699).

Whether we refer to the cause for which we search as the "direct and immediate cause" or the "effective and proximate cause" is not material, "it is the predominant and determining cause that is to be sought," Lord MacMillen in *Yorkshire Dale Steamship Company, Ltd.* v. *Minister of War Transport, supra,* at 702, and in this same case Lord Wright, citing *Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Co.* (1918) A. C. 350, " 'Proximate' here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case."

It is true that the causes of an event are all the preceding circumstances which brought the event to pass—and they are myriad. "As to what is the cause of an event, philosophers and logicians may differ from jurists • • •.

The proximate cause of the law is not the proximate cause of the logician." *Merrill* v. *Los Angeles Gas*, etc. 158 Cal. 499, 503; 11 Pac. 534, 536 (1910).

[fol. 128] We adopt as guide posts the thoughts expressed by Lord Wright in *Yorkshire Dale Steamship Company, Ltd.* v. *Minister of War Transport, supra*, at 706:

> "Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view."

While Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493 (1923), observed that,

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *"

(*Cf. Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 438), we do not find any conflict in this respect between the law of England and that of the United States. Indeed, in the same decision, Justice Holmes wrote (at p. 492):

> "On the other hand the common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and, if it is understood, does not deserve much criticism. . . . *Morgan* v. *United States*, 14 Wall. 531 * * *"

In *Link et al.* v. *General Ins. Co. of America* (*Eastern Prince* v. *U.S.S. Roustabout*), 56 F. Supp. 275 and 77 F. [fol. 129] Supp. 977, we find a recent application of these principles. *But see, Allocation of Risk between Marine & War Insurer*, 51 Yale, L. J. 674.

Nor, do we find the decision of our learned brother, Judge Galston of the Eastern District of New York in *Meseck Towing Lines, Inc. et al.* v. *Excess Ins. Co., Ltd. et al.*, 77 F. Supp. 790, 793, in conflict with the views here adopted. It is quite apparent there that the court intended to limit its conclusions to the facts involved—that the collision occurred during a "preliminary manoeuvring in a peaceful harbor prior to reaching an appointed war station. . . ."

We look, then, for the cause "predominant in efficiency" and this merely involves "a process of selection from among the co-operating causes to find what is the proximate cause in the particular case." Lord Wright, in *Yorkshire Dale Steamship Company, Ltd.* v. *Minister of War Transport, supra,* p. 706; *British and Foreign Steamship Company, Ltd.* v. *The King* (*St. Oswald* v. *Suffren*), (1918) 2 K. B. 879, 890-91.

It is argued by the Government that the negligence of the masters of both vessels was a new, separate and distinct factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. With this, we cannot agree.

Here, concededly, negligence in navigation existed on the part of both masters, but that negligence did not break the chain of causation so as to prevent the loss from being attributable to the warlike operation. The YMS-12 and the two accompanying vessels, in mine sweeping formation, proceeding with mine sweeping gear, streamed and trail-[fol. 130] ing paravanes, presented an unusual and unexpected obstacle to navigation. The YMS-105 was the guide ship of the formation, the YMS-12 was stationed several hundred yards on the starboard beam of the YMS-105 and the third vessel in the formation, the AMC-95, was echelon to the right of the guide ship, in a position approximately a half mile astern and midway between the YMS-105 and the YMS-12. From the time of the encounter until actual collision the vessels continued in their mine sweeping operations with their paravanes trailing; in all her manoeuvres and in her navigation the YMS-12 was necessarily restricted and impeded. This unusual formation, of which the YMS-12 was a part, closed to the S. S. John Worthington lanes of navigation affording possible escape which would ordinarily have been open to her.

The negligence found to exist was negligence "under the circumstances" of the special and extraordinary conditions existing—conditions created by the warlike operation of mine sweeping.

(4) The liability of Standard Oil, as owner of the John Worthington, to the United States of America for any part of the damage sustained by the YMS-12 is covered

by the war risk insurance issued by the United States under Clause "20" of the charter party. (Finding of Fact 7).

A somewhat similar problem was presented in *Adelaide Steamship Company, Ltd.* v. *Attorney General* (*The Warilda*), (1926) A. C. 172. This appeal terminated the litigation which arose out of the collision between the ambulance transport "Warilda" and the merchant vessel "Petingaudet." It had been previously determined that [fol. 131] the collision was due to the negligence of the master of the "Warilda" and that this ship was liable to the "Petingaudet" for her damages. But, it was subsequently adjudged that the collision was a consequence of a warlike operation in which the "Warilda" was engaged (1923 A. C. 292). The question answered by the final appeal, was (p. 178): "Whether the liability undertaken by the collision clause is or is not a risk which would be excluded by the 'f. c. and s.' clause set out in cl. 19 of the charter party, as being a consequence of warlike operations." The Court held that the liability was not so excluded and recovery to the "Warilda" was denied.

Viscount Cave, L. C. wrote (at 178-79):

> "It was held in *Ionides* v. *Universal Marine Insurance Co.* (n. 14 C. B. (N. S.) 259), and has not since been doubted, that in applying the exception created by the f. c. and s. clause the Court must look at the proximate and not at the remoter consequences of the warlike operation; and while it has been decided by this House that the collision itself and the consequent damage to the *Warilda* were the direct result of the warlike operation in which the *Warilda* was engaged, it does not follow that the liability of the *Warilda* to the owner of the *Petingaudet* falls within the same category. That liability arose, not from the collision taken by itself, but from the negligence of the master of the *Warilda*, which alone constituted the cause of action, and was, therefore, not a direct and proximate consequence of the warlike operation. This seems to me to follow from the decision in the case of *De Vaux* v. *Salvador* (n. 4 Ad. & E. 420, 431), where [fol. 132] it was held that the sum which a shipowner had to pay for damage to another ship caused partly by the negligence of his servants was too remote from

the sea perils against which his ship was insured to be recovered by him under a marine policy. Lord Denman, in delivering the judgment of the Court in that case, said: 'The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against,' "

And, the learned judge continued (at p. 179):

"It is true that the policy to be hypothesized under cl. 19 of the charter-party is a policy containing the [fol. 133] collision clause, and that where that clause is present in a policy the underwriters are liable for a proportion of the damage caused to the other ship; but this is the result, not of a loss by the perils insured against, but of the 'special contract' of the underwriters contained in the collision clause: see *Xenos* v. *Fox*. (N. L. R. 3 C. P. 630, 635)."

Bovil, C. J. in *Xenos* v. *Fox, supra,* wrote (at p. 634):

"It has long been settled that an ordinary policy does not cover the liability for damage done to another vessel by the negligence of those in charge of the vessel insured; and such a case would not come within the ordinary perils insured against, or within the usual

suing and labouring clause in an ordinary policy. A collision clause in various forms has therefore for many years been in use where parties desire to be protected against the consequences of a collision arising from the fault of their own vessel. It is in each case a special contract very different from the contract of insurance in its ordinary form; and the liability under it does not depend upon the ordinary perils covered by the policy, but upon the special matters mentioned in the clause itself."

We turn then to an examination of the material provisions of the marine policy and war risk endorsement here involved.

It was the manifest intent and general scheme of the insurance to exclude from the marine policy certain risks including those caused by or resulting from "all consequences of hostilities or warlike operations," and to as- [fol. 134] sume by the war risk endorsement all risks so excluded from the marine policy.

The war risk endorsement reads as follows:

"War Risk Clauses

Endorsement to be attached to and made a part of Policy No. —.

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. and S. warranty contained therein but which are excluded by that warranty." (Finding of Fact, 11, sup.)

The second paragraph of the "F. C. & S." clause provides:

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force." (Finding of fact 10, supra).

This, in effect is a subordination clause whereby the scope of the "F. C. & S." clause must be read as coextensive with the undertaking contained in the war risk endorsement.

Thus, the first paragraph of the "F. C. & S." clause should be read:

> "Notwithstanding anything to the contrary contained in the Policy (including the collision clause), [fol. 135] this insurance (including the collision clause), is warranted free from any claim for loss, damage, or expense caused by or resulting from . . . all consequences of hostilities or warlike operations. . . ."

The clause involved in *Adelaide Steamship Company, Ltd.* v. *Attorney General, supra,* is set forth at length (at pp. 177-78):

> "Clause 19 of the charterparty T-99 (which has the marginal note 'war risks damage or loss of ship') is in the following terms: '19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar, but not more extensive clause: "Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war."'"

Its effect was to be measured as though "an ordinary English policy of marine insurance" had been issued, containing what amounted to a form of "F.C.&S." clause. When compared to the clauses here involved we find that it does not contain the words "including the Collision Clause" or any similar words.

It appears that the whole purpose of the subordination was to make the exclusion of the "F.C.&S." clause commensurate with what was assumed by the war risk endorsement. The result is that the running-down liability for war risk collision is excluded from the marine policy and [fol. 136] that the war risk underwriters assume the collision liability so excluded.

(5) It follows that the United States of America must indemnify Standard Oil against all the costs of defense of the suit brought by it, and this amount will be determined by usual reference.

Proctors will confer with the court on December 16th, 1948 at 10.30 a.m. in chambers on the terms of decrees to be entered; proposed decrees will be noticed for settlement for that day.

Dated, New York, N. Y. December 3, 1948.

Sylvester J. Ryan, U.S.D.J.

[fol. 137] In United States District Court, Southern District of New York

A. 131-151

A. 153-203

[Same titles]

Order and Decree

The above entitled suits having regularly come on for trial in this Court before Honorable Sylvester J. Ryan, United States District Judge, the parties having appeared by their respective counsel, and the Court after all the proof of the parties had been taken, having filed its decision, findings of fact and conclusions of law, it is

Ordered that the above entitled suits be and are hereby consolidated for the purpose of this decree and for the purpose of appeal, and it is

Ordered, adjudged and decreed that the United States of America, as owner of United States Ship YMS-12, libelant, is entitled to recover one-half of its damages arising from the collision described in its libel, from Standard Oil Company of New Jersey (now known as Esso Standard Oil Company), respondent, and that the said Standard Oil Company of New Jersey is entitled to recover that identical amount, by reason of the War Risk Insurance provisions of the Requisition Time Charter, and War Risks Binder issued

in accordance therewith, described in its answer and libel, [fol. 138] from, and to set off the said amount against, the United States of America, libelant, and it is, therefore,

Ordered, adjudged and decreed that the libel of the United States of America in A. 131-151, as owner of the United States Ship YMS-12, be and is hereby dismissed, with costs, and it is further

Ordered, adjudged and decreed that Standard Oil Company of New Jersey (now known as Esso Standard Oil Company), libelant in A. 153-203, recover of and from the United States of America, respondent therein, as damages, by reason of the War Risk Insurance provisions of the aforesaid Requisition Time Charter and War Risks Binder issued in accordance therewith, in addition to the foregoing set off, any and all costs of its defense of and to the aforesaid libel of the United States of America, with interest and the costs of its said suit, and it is

Ordered that this cause be referred to Edward Ryan % Foley & Martin 64 Wall St. N. Y., as Commissioner, to ascertain and compute the amount of said damages sustained by said libelant, Standard Oil Company of New Jersey (now known as Esso Standard Oil Company), and to report to this Court thereon.

Dated, New York, N. Y., December 16, 1948.

Sylvester J. Ryan, U.S.D.J.

[fol. 139] In United States District Court, Southern District of New York

A. 131-151

A. 153-203

[Same Titles]

Notice of Appeal

Sirs:

Please take notice that respondent, United States of America, hereby appeals to the United States Court of

Appeals for the Second Judicial Circuit from the decree entered herein in the Office of the Clerk of this Court on December 16, 1948, and from each and every part of said decree, except the provision thereof adjudging the United States of America entitled to recover one half its damages arising from the collision described in its libel from Standard Oil Company of New Jersey (now known as Esso Standard Oil Company) respondent, and from the whole of said decree excepting only the aforesaid provision.

[fol. 140] Dated: New York, New York, December , 1948.

John F. X. McGohey, United States Attorney for the Southern District of New York, Proctor for Respondent United States of America. Office & P. O. Address, 45 Broadway, New York 6, N. Y.

To: William V. Connell, Clerk, Southern District of New York. Kirlin, Campbell, Hickox & Keating, 120 Broadway, New York 5, N. Y.

[fol. 141] In United States District Court, Southern District of New York

A. 131-151

A. 153-203

[Titles omitted]

Petition and Order Allowing Appeal

The respondent, United States of America, being aggrieved by the decision, findings of fact and conclusions of law herein, dated and filed December 3, 1948, and by the decree entered thereon in the proceeding herein, thereby consolidated on December 16, 1948, in the office of the Clerk of the United States District Court for the Southern District of New York, hereby prays that an appeal therefrom

[fol. 142] be allowed to the United States Court of Appeals for the Second Judicial Circuit.

Dated: New York, New York, December 28, 1948.

John F. X. McGohey, United States Attorney for the Southern District of New York, Proctor for Respondent United States of America. Office & P. O. Address 45 Broadway, New York 6, N. Y.

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by respondent, United States of America, be and the same hereby is allowed.

Dated: New York, New York, December 29, 1948.

Wm. Bondy, U. S. D. J.

[fol. 143] In United States District Court, Southern District of New York

A. 131-151

A. 153-203

[Same Titles]

Appellant's Assignment of Errors

The United States of America, Libelant and Cross-Respondent in the above entitled consolidated proceeding hereby assigns errors in the proceedings, opinion, decision and interlocutory decree of the United States District Court for the Southern District of New York as follows:

1. In that the Court dismissed the libel of the United States of America instead of awarding it one half the damages sustained by its naval craft YMS-12.

2. In that the Court decreed that the United States pay respondent and cross libelant, Standard Oil Company of New Jersey, the amount of its costs and expenses incurred in defending the Government's suit for damage to its naval craft, YMS-12.

3. In that the Court erroneously held that the collision between the United States Ship YMS-12 and the Steam

Tanker JOHN WORTHINGTON was a risk insured against by policy of insurance issued by the United States insuring against certain specified risks of war only.

4. In that the Court erroneously held that liabilities incurred by the respondent and cross libelant, Standard [fol. 144] Oil Company of New Jersey and its vessel SS. JOHN WORTHINGTON were within the coverage of the war risk insurance policy issued by the United States to said respondent and cross libelant.

5. In that the Court failed to award United States of America a decree for one half the damage sustained by USS YMS-12 with interest and costs.

6. In that the Court failed and refused to dismiss the cross libel of Standard Oil Company of New Jersey against United States of America with costs.

Dated: New York, New York, May 18, 1949.

John F. X. McGohey, United States Attorney, Proctor for United States of America, Office & P. O. Address, 45 Broadway, New York 6.

To William V. Connell, Esq., Clerk; Kirlin, Campbell, Hickox & Keating, Esqs., Proctors for Respondent and Cross Libelant, 120 Broadway, New York 5, N. Y.

[fol. 145] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 131-151

A. 153-203

[Titles omitted]

STIPULATION RE EXHIBITS

It is hereby stipulated and agreed:

(1) With respect to Exhibit 1—only the stipulation of facts and so much of the addenda thereto as are set forth in the Court's opinion on pages 4-8 need be printed. Three

copies of the full text of said exhibit, with all addenda, are to be handed to the Court on the argument of this appeal.

[fol. 146] (2) Exhibit 2 need not be printed but three copies thereof shall be handed to the Court on the argument of this appeal.

Dated: New York, N. Y., August 11, 1949.

John F. X. McGohey, Proctor for Libelant and Cross-Respondent Appellant; Kirlin, Campbell, Hickox & Keating, Proctors for Respondent and Cross-Libelant Appellee.

[fol. 147] In United States Court of Appeals, Second Circuit

A. 131-151

A. 153-203

[Titles omitted]

Stipulation and Order Extending Time

It is hereby stipulated and agreed by and between the proctors for the respective parties that the time of the appellant, United States of America, to file its record and brief on appeal be and the same hereby is extended to and including the 15th day of July, 1949.

John F. X. McGohey, Proctor for Appellant; Kirlin, Campbell, Hickox & Keating, Proctor for Appellee.

So Ordered: New York, N. Y., May 19, 1949.

Alexander M. Bell, Clerk.

[fol. 148] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Same Titles]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated: August —, 1949.

John F. X. McGohey, Proctor for Appellant; Kirlin, Campbell, Hickox & Keating, Proctor for Appellee.

[fol. 149] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 150] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1949

Nos. 76 and 77

(Argued November 11, 1949. Decided December 15, 1949)

Docket Nos. 21441 and 21442

UNITED STATES OF AMERICA, as owner of United States Ship YMS-12, Libelant-Appellant,

v.

STANDARD OIL COMPANY OF NEW JERSEY, Respondent-Appellee

STANDARD OIL COMPANY OF NEW JERSEY, as owner of the Steam Tanker John Worthington, Libelant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant

Before: Augustus N. Hand, Chase and Clark, Circuit Judges

[fol. 151] Appeal from the United States District Court for the Southern District of New York

Libel by United States of America, as owner of United States Ship YMS-12, against Standard Oil Company of New Jersey, for damages sustained in collision, and libel by Standard Oil Company of New Jersey, as owner of the steam tanker John Worthington, against the United States of America upon contract of war risk insurance for any sum which the Standard Oil Company may be held liable to pay in the collision action, and expenditures necessarily incurred in the defense thereof, the libels being consolidated for the purposes of trial and appeal. From a decree holding each party liable for one-half of the damage to the ship YMS-12 arising from the collision and further directing recovery by the Standard Oil Company of New Jersey of its share of the damage adjudged against it upon the contract of war risk insurance of the United States of America, dismissing the libel of the United States of America, and referring the cause to a commissioner to ascertain the amount of damages sustained by the Standard Oil Company of New Jersey,

D. C. S. D. N. Y., 81 F. Supp. 183, the United States of America appeals. Reversed.

Edward L. Smith, of New York City (Irving H. Saypol, U. S. Atty., of New York City, on the brief), for appellant.

Edwin S. Murphy, of New York City (Kirlin, Campbell, Hickox & Keating, Raymond T. Greene, and Helen C. Cunningham, all of New York City, on the brief), for appellee.

[fol. 152] CLARK, Circuit Judge:

The interesting question presented in this case is whether damage from a collision of an oil tanker with a minesweeper at work in the swept channel off New York harbor on December 16, 1940, was covered by special "war risk" or ordinary marine insurance, when the collision was due to the faulty navigation of the two vessels.

The vessels involved in the collision were the United States Navy Ship YMS-12 and the steam tanker John Worthington; it occurred at sea in a bouyed channel in the approaches to the New York harbor. At the time of the collision the YMS-12 was one of a three-ship formation proceeding seaward with mine sweeping gear streamed sweeping the buoyed channel. The John Worthington was outbound from New York in ballast, and was proceeding to sea in convoy. Both ships displayed regular and proper running lights, and in addition the YMS-12 was displaying three all-round green lights to indicate that it was a mine sweeping vessel towing mine sweeps. The weather was clear and the visibility was good.

The district court has found, pursuant to a stipulation of the parties, that "the aforesaid collision was contributed to both by fault in the navigation of SS. John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." Only the YMS-12 was damaged as a result of the collision.

The John Worthington, owned and operated by the Standard Oil Company of New Jersey, was on a time charter to the United States Government. The charter party provided that the United States was to furnish "a standard hull war risk policy of the War Shipping Administration" and [fol. 153] Standard was to assume or insure against all

other risks. Thus Standard took out a normal marine hull policy which contained an F. C. & S. clause, excluding from its coverage war risks. Some twenty-two risks were defined by the parties as "war risks," including the important exclusion of "loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations."[1] Under the "war risk" endorsement attached to that marine hull policy the United States assumed "only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty."

Since both ships were at fault, the United States of America would normally be entitled to recover from Standard for half of the damage suffered by the YMS-12; and it filed its libel below asking for such recovery. But Standard maintains that this was a "consequence of hostilities" insured against by the government, and has brought a cross-libel to recover from the government as war risk insurer the amount for which it is liable to the government as owner of the YMS-12. The two libels have been consolidated for the purposes of trial and appeal. The district court, in a reasoned opinion by Ryan, J., 81 F. Supp. 183, held that [fol. 154] the collision did come within the war risk insurance and held in favor of Standard.[2] From that holding the government appeals.

The United States began to assume the war risks of merchant vessels at the time of the Civil War, and that

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[1] Appellee has suggested that this language provides a broader coverage than "war risk," thus leading to the argument that the earlier American cases dealing with war risk insurance are not controlling. But the parties here showed a different view in their twenty-two clauses defining a war risk—insurance for this being the form of insurance required of the government under its charter obligation—and demonstrating that "consequence of hostilities" was only one component, of many, of war risk; and we see nothing in the earlier cases or here to indicate that this conception is other than the natural and usually understood one.

[2] The report of the decision in 81 F. Supp. 183 contains a full statement of the facts and extracts from the insurance contract in issue; reference to it is assumed hereinafter.

conflict produced much litigation in our courts as to what constituted a war risk. Since that period, however, the question has arisen but infrequently in this country. The situation is otherwise in Great Britain, where half a dozen times in the last thirty years the House of Lords has been concerned with the meaning of just such a clause as that involved here.

Although it is not always easy to reconcile the diverse language of the many cases in both countries on this question, the principle which may properly be drawn from them is that a loss will be held to be a "consequence of hostilities" and to come within the limits of war risk insurance where one of the vessels party to the loss is both engaged in a warlike operation and so navigating as a result of the war that it creates a peril. To put it another way, not only must the vessel's mission be one of war, but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe.

Thus this principle affords the justification for a group of cases in which a vessel was so navigating because of the war as to create a peril, but was not on a mission of war; and the loss was held to be a marine risk, rather than a war risk. It explains the result in the companion cases of *Britain Steamship Co. Ltd.* v. *The King* (*The Petersham*) and *Green* v. *British India Steam Navigation Co. Ltd.* (*The Matiana*), [1921] 1 A. C. 99. The Petersham collided with another ship while both were sailing without lights in ac- [fol. 155] cordance with admiralty rules. The Matiana stranded on a reef while sailing under convoy and zigzagging. Both accidents were held to be not the consequence of hostilities, since the vessels were carrying non-war cargoes and were not bound for war bases. The same principle was involved in the leading American case of *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)*, 263 U. S. 487. The Napoli collided with another ship while both were sailing without lights and under convoy. Even though it carried some war materials it was held not to have been engaged in a warlike operation, and thus the loss was not a war risk. In accord is a decision of Judge Bright in *Nordling* v. *Gibbon*, D. C. S. D. N. Y., 62 F. Supp. 932. There the collision was the result of the joint negligence of two ships blacked out under Navy orders, but the insured ship was neither a warship nor bound for a war base, and its cargo, though intended for manufacture of war mate-

rials, was not capable of use for war in its then form. Hence its operation was not warlike, and the accident was not the result of warlike operations.

In other cases a loss has been held to be a marine risk, even though a ship was involved in warlike operations, where the loss was not caused by navigation because of the war. This was the result in *Clan Line Steamers Ltd.* v. *Board of Trade* (*The Clan Matheson*), [1929] A. C. 514. The Clan Matheson, proceeding in a convoy at night without lights, was hit and sunk by a warship admittedly engaged in warlike operations. But it was hit because its steering gear had broken, causing it to drift across the course of the warship; and hence the breakdown of the gear, rather than the collision with the warship, was the dominant and effective cause resulting in the loss of the ship. A similar rule governed in *Liverpool and London War Risks Ass'n Ltd.* v. *Ocean Steamship Co. Ltd.* (*The* [fol. 156] *Priam*), [1948] A. C. 243. The Priam, carrying war materials across the ocean and thus admittedly engaged in a warlike operation, ran into heavy weather which caused considerable damage. Some of the damage was attributable to war materials and armament carried on deck in a manner which would never have been countenanced save for the exigencies of war. This damage was said to be the result of a specific and special war peril, and the war risk underwriters were held responsible. But other damage which would have occurred solely because of the weather, regardless of the special arrangements for cargo handling necessitated by the war, was charged to the underwriters of the normal marine risk insurance.

There have been, of course, many cases in which both of the necessary elements were present, and in which the war risk underwriters were made to bear the loss. *Attorney General* v. *Ard Coasters Ltd.* (*Ardgantock*), [1921] 2 A. C. 141, involved a collision between a merchant vessel and a destroyer on patrol duty in the North Sea. Neither vessel was negligent, but both were sailing without lights and the collision was caused by the course required by the destroyer's patrol duties. *Liverpool & London War Risks Insurance Ass'n Ltd.* v. *Marine Underwriters* (*Richard de Larrinaga*), [1921] 2 A. C. 141, concerned a collision between a merchant vessel in convoy and a warship en route to take up escort duties. Again both vessels were unlighted because of the submarine danger, and neither was negligent. The

transport by sea of war material in time of war from one war base to another was held to be a warlike operation in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*), [1923] A. C. 191; where two ships thus occupied collided, without negligence, and navigating without lights, the loss was held a consequence of hostilities. The most recent and most widely dis- [fol. 157] cussed of this group of cases is *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691. There a ship, admittedly engaged in a warlike operation, stranded. Although an unexpected tide set was a complicating factor, the dominant and effective cause which set the vessel on the rocks was a deviation of course it had made under naval orders to avoid submarine attack. The loss was held to have been a war risk.

There are two other cases which properly belong in this final category, but which have employed language so strong that some authorities have regarded them as stating a different rule from that which we have drawn from the cases. *Attorney General* v. *Adelaide Steamship Co. Ltd.* (*The Warilda*), [1923] A. C. 292, involved a collision between a hospital ship evacuating wounded troops from France, blacked out, and another ship which was displaying dimmed side lights. On these facts it would seem a simple case of a vessel both engaged in a warlike operation and so navigating as a result of the war that it creates a peril; the loss would properly be a consequence of hostilities. But the difference in this case was that the Warilda was held to have been negligent; and it was argued that the real cause of the collision was negligence, a marine risk, rather than the war risks incurred by sailing without lights. The House of Lords held that the dominant and effective cause of the collision was the warlike operation, but went on to use very strong language which might seem to negative negligence as an intervening factor taking a loss out of the category of "consequences of hostilities." Thus Lord Shaw of Dunfermline said, at 300: "* * * when a ship requisitioned by the naval authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, with lights doused and other such warlike precautions, the [fol. 158] category of war risk cannot be changed into the

category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faulfily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations."

The other of these cases is *Board of Trade* v. *Hain Steamship Co. Ltd. (Roanoke-Trevanion)*, [1929] A. C. 534. There a merchantman collided with a Navy mine planter. The collision was due to negligence by both vessels, but this was held to be immaterial and the loss was judged a consequence of hostilities.

In his summary of the principles of British law on this subject in *The Coxwold, supra*, [1942] A. C. 691, at 716, Lord Porter read the two cases just discussed as laying down the following rules: "(8). If the collision be caused both by the ship so engaged [on a warlike operation] and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the warlike operation: *The Roanoke-Trevanion.* (9). The collision, if due in whole or in part to the action of the ship engaged in a warlike operation, does not cease to be caused by the warlike operation by reason of the fact that that action is negligent: *The Warilda.*" Some text writers have gone even further and have found in these cases an "unexpressed premise that the war risk insurer is liable ipso facto for all accidents to ships in what might, for any technical reason, [fol. 159] be denominated war service." Note, *Allocation of Risk Between Marine and War Insurer*, 51 Yale L. J. 674, 679; and see also Derby, *What Are Warlike Operations Under F. C. & S. Clause in Marine Policies*, 33 Calif. L. Rev. 128.

If the *Warilda* and *Roanoke-Trevanion* cases really carry British law thus far, we are necessarily compelled to refuse to follow them. For such an extreme rule would conflict hopelessly with a long line of American decisions. These decisions emphasize that it is not enough that a vessel merely be engaged in warlike operations, but the dominant and

effective cause of the loss must be the warlike character of the operation. Where a vessel engaged in a warlike operation suffers damage because of a peril common to war vessels and non-war vessels alike, the marine underwriters, rather than the war risk underwriters, will be held liable. The leading American decision is *Morgan* v. *United States*, 14 Wall. 531, where damage to a ship resulting from stranding on a sand bar while under orders of a government pilot and in the process of carrying urgent munitions and men was held a marine, rather than a war, risk. The Court said, at page 535: "That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule, '*Causa proxima non remota spectatur*,' we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel."

In accordance with the rule there laid down, the following were held to be marine, rather than war, risks: injury to a troop transport from drifting ice when army orders compelled the voyage, even though ice conditions made navigation unsafe, *Reybold* v. *United States*, 15 Wall. 202; damage from a leak sprung while the vessel was carrying military stores, *Goodwin* v. *United States*, 17 Wall. 515; a stranding [fol. 160] caused by the vessel's negligence in course of maneuvering to land troops in theatre of active operation, *White* v. *United States*, 154 U. S. 661; a collision with a drifting derelict while the vessel was proceeding at full speed through dense fog pursuant to urgent military orders, *Mott* v. *United States*, 9 Ct. Cl. 257; the striking of a submerged anchor in the course of voyage to supply troops in the field, *Leary* v. *United States*, 14 Wall. 607; a collision, stranding and bumping while the vessel was carrying men and horses to theatre of operations, *New Orleans-Belize Royal Mail and Central American Steamship Co. Ltd.* v. *United States*, 239 U. S. 202.

Our own court has emphasized that the proximate cause of a loss must have been warlike in order to make the loss a war risk. *Reinold* v. *United States*, 2 Cir., 167 F. 2d 556, certiorari denied 335 U. S. 824, holding that the shooting of an officer of an armed merchant vessel by a drunken guard was not within a war risk life policy. And search for the "cause nearest the loss" has been the basis for the

determination of liability under analogous circumstances in many other cases. *The Napoli, supra; Crist* v. *United States War Shipping Administration*, 3 Cir., 163 F. 2d 145, certiorari denied 332 U. S. 852; *Dennehy* v. *United States*, D. C. S. D. N. Y., 15 F. 2d 196; *Standard Oil Co. of New Jersey* v. *St. Paul Fire & Marine Ins. Co.*, D. C. S. D N. Y., 59 F. Supp. 470. Thus we believe a correct statement of the American rule to be that under a policy which expressly insures against war risks or "all consequences of hostilities or warlike operations," the coverage extends only to perils due directly to some hostile action, military maneuver, or operational war danger, and does not include the aggravation or increase of a maritime risk because of war operations. 45 C. J. S. § 863.

[fol. 161] If we were to follow the supposed British rule that any loss occurring to a vessel engaged in a warlike operation is a consequence of hostilities, there would be no point in the taking out of marine insurance by ships devoted to missions of war, since the war risk insurance provided by the government would cover any losses they might incur. But the contrary is of course the practical course followed. The very charter party involved in this case refutes the theory by its insistence that Standard either assume or insure all normal marine risks which the John Worthington would incur while engaged by the government. Clearly it was not the intention of the parties that the war risk insurance should provide complete coverage for the vessel. And our conclusion is supported by the fact that marine insurance did not become superfluous during the war, but actually the marine insurers added a special wartime surcharge to their premium rates because of the increased navigation perils which would be met by vessels while on warlike operations. Note, 51 Yale L. J. 674, 679 n. 42.

It is urged, however, that we should decide these cases by a mechanical application of the British holdings because of the so-called "rule of conformity." This "rule" springs from a dictum of Justice Holmes in *The Napoli, supra*, 263 U. S. 487, at 493, where he said: "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." It was the basis of the decision in *Link* v. *General Ins. Co. of America* (*The Roustabout*), D. C. W. D. Wash., 56 F. Supp. 275, 276, where the court said: "* * * if there

is an authoritative English decision on the facts of the case in question that decision concludes the matter." In that case a merchant ship collided with a Navy oiler carrying naval supplies. Although both vessels were at fault, the negligence of the oiler was held to be the proximate [fol. 162] cause of the collision. But the court regarded negligence as immaterial, on the basis of *The Warilda* and *The Roanoke-Trevanion*, both *supra*, and held that the collision was a consequence of hostilities covered by the war risk insurance. This holding was affirmed, with the Court of Appeals citing the Holmes dictum. *General Ins. Co. of America* v. *Link*, 9 Cir., 173 F. 2d 955, 956.

We do not read Justice Holmes' statement as requiring conformity with the British decisions when the American rule is different. Further, such a rule at best had its basis entirely in business expediency, and should not go beyond that. Here all demands of business expediency must be held to have ceased because the British underwriters in 1942 changed the form of their F. C. & S. clause and war risk clause to avoid the ambiguities of the language in some of the British decisions by making it clear that not only must the vessel have been engaged in a warlike operation, but the warlike character of the operation must have been the direct and effective cause of loss. [1943] A. M. C. 130.[3] Thus it is no longer necessary to conform to the supposed British rule in order that the same language shall mean the same thing both in America and England. Indeed, the English experience affords a practical demonstration of rejection by the affected business itself of an extreme judicial rule operating supposedly in its favor.

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[3] "* * * but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power." F. C. & S. Clause (1942), [1943] A. M. C. 130, 131. The learned editors of the work cited point out that this was adopted "to correct and restore the distribution of marine and war risks" as affected by the *Coxwold* case, but that it does more than neutralize the *Coxwold* result; it also "sets aside" the result of the *Roanoke-Trevanion*, *Warilda*, and other cases cited.

[fol. 163] As a matter of fact, the rules set forth by the House of Lords are probably not as much at variance with our rules as has been claimed. Under our own authorities the war risk underwriters must be held liable for the loss of a ship which by faulty navigation has left a swept channel and hit a mine. And if a master negligently fails to black out his vessel, and the lights left on it enable a submarine to torpedo it, there would be little hesitation in calling the loss a consequence of hostilities. But such holdings would be not because any loss incurred by a ship on warlike operations is covered by war risk insurance or because negligence is immaterial in determining whether or not a loss is a consequence of hostilities. Rather it would be because the negligence in the cases we state would not be the dominant and effective cause producing the loss, and under our authorities such cause must be sought.

But the British courts appear ultimately to be concerned with proximate cause just as are we. Thus the Lord Chancellor said in *The Coxwold, supra*, [1942] A. C. 691, at 696, 697: "Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence of' a warlike operation merely by showing that it happened 'during' a warlike operation." He then went on to tell the House of Lords that they must search for the "effective and predominant cause of the accident." The Law Lords then proceeded to set out the standards by which one determines proximate cause, and urged that a real, common-sense standard should be used, such as would be employed by the man in the street. It is for its clarification of the rules of causation that *The Coxwold, supra*, has been so enthusiastically hailed by the periodicals. See Note, 59 L. Q. Rev. 6. To similar effect is the dictum of Lord Wrenbury in *The Petersham* and *The Matiana, supra*, [1921] 1 A. C. 99, at 134: "I [fol. 164] feel grave difficulty, however, in saying that from the mere fact that a vessel is a vessel of war and is steaming in her duty as such, it results that if she collides with another vessel and sinks her, the loss is in consequence of a warlike operation."

Applying the principles which we have deduced to the facts of the case before us, we think the result tolerably clear. It is conceded that the YMS-12 was engaged in a warlike operation at the time of the collision. Thus the question which we must decide is whether the warlike operation and the perils to navigation caused thereby was the

effective cause of this accident. On facts almost identical to those involved here, a district court has found that the effective cause of the accident was the joint negligence of the merchantman and the Navy vessel, rather than the warlike character of the operation. *Maseck Towing Lines, Inc.* v. *Excess Ins. Co. Ltd.*, D. C. E. D. N. Y., 77 F. Supp. 790. The court said, at page 793: "In other words, the 'cause nearest to the loss' [citing *The Napoli, supra*], i. e. the proximate, not the remote cause, must be held to be negligence in navigation in a peaceful harbor. That the vessel in collision with the civilian ship chanced to be a warship constitutes at most a remote but not a proximate cause."

The burden of proof in cases of this sort is on those who claim that a loss resulted from a war risk, rather than a marine risk. *The Priam, supra,* [1948] A. C. 243, at 259; *The Warilda, supra,* [1923] A. C. 292, at 305; *The Petersham, supra,* [1921] 1 A. C. 99, at 119; 51 Yale L. J. 674, n. 2. The stipulated facts show agreement that the cause of this collision was "failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." This finding not only fails to satisfy the burden on Standard to show that the loss was a consequence [fol. 165] of hostilities, but rather is a positive indication that the loss was due to the normal marine risk of failure to comply with the applicable rules and the requirements of good seamanship. We cannot agree with appellee's argument that the words "under the circumstances" carry some connotation limiting the otherwise clear force of the words. There is nothing to suggest a strained construction of so fairly simple and indeed ordinary a statement.

Thus the United States may collect from Standard for one-half the damage to the YMS-12, but Standard may not collect the amount of its liability from the United States as its insurer against war risks. In the light of this conclusion it is unnecessary to consider the further difficult question raised by *Adelaide Steamship Co. Ltd.* v. *The Crown (Second Warilda)*, [1926] A. C. 172, and considered below at pages 191-193 of 81 F. Supp. as to whether the insured under a war risk policy can collect, in addition to his own damage, amounts which he owes to others, even if his liability be considered the result of a war risk.

In the consideration of this interesting case, the court has been greatly aided by the scholarly briefs and effective

arguments of counsel. It is a pleasure to record the court's appreciation of the lightening of its load resulting from so able a presentation of the important issues here involved.

Reversed.

[fol. 166] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of December one thousand nine hundred and forty-nine.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES, as Owner, etc., Libelant-Appellant,

v.

STANDARD OIL CO. OF NEW JERSEY, Respondent-Appellee.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 167] [Endorsed:] United States Court of Appeals, Second Circuit. United States, as Owner, etc., v. Standard Oil Co. of New Jersey. 76. Judgment. United States Court of Appeals, Second Circuit. Filed Dec. 15, 1949. Alexander M. Bell, Clerk.

[fol. 168] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of December one thousand nine hundred and forty-nine.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

STANDARD OIL CO. OF NEW JERSEY, as Owner, S/T. J. Worthington, Libellant-Appellee,

v.

UNITED STATES, Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 169] [Endorsed]: United States Court of Appeals, Second Circuit. Standard Oil Co. of New Jersey, as Owner, etc., v. United States. 77. Judgment. United States Court of Appeals, Second Circuit. Filed Dec. 15, 1949. Alexander M. Bell, Clerk.

[fol. 170] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 171] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 27

ORDER ALLOWING CERTIORARI—Filed June 5, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 172] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 28

ORDER ALLOWING CERTIORARI—Filed June 5, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 54,412, 54,413, U. S. Court of Appeals, Second Circuit, Term No. 27. Standard Oil Company of New Jersey, Petitioner, vs. The United States of America, as Owner of the United States Ship YMS-12. Term No. 28. Standard Oil Company of New Jersey, as Owner of the Steam Tanker John Worthington, Petitioner, vs. The United States of America. Petition for writs of certiorari and exhibit thereto. Filed March 10, 1950. Term No. 27 O. T., 1950. 28 O. T. 1950.

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Supreme Court of the United States

OCTOBER TERM, [illegible], No. [illegible] 27

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

against

UNITED STATES OF AMERICA, as Owner of the United States Ship *YMS-12*,
Respondent.

OCTOBER TERM, 1949, No. [illegible] 28

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker *JOHN WORTHINGTON*,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1949, NO. 27

STANDARD OIL COMPANY OF NEW JERSEY,

Petitioner,

against

UNITED STATES OF AMERICA, as Owner of the United States Ship *YMS-12*,

Respondent.

OCTOBER TERM, 1949, NO. 28

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker *John Worthington*,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Standard Oil Company of New Jersey, prays that a writ of certiorari be issued to review the decision and judgments of the United States Court of Appeals for the Second Circuit, dated December 15, 1949, in the cases above entitled. R. 150-163.

Opinions Below

The opinion of the United States Court of Appeals is reported in 178 F. 2d 488, and appears at pages 150-162 of the record.

The decision of the District Court is reported in 81 F. Supp. 183 and appears at pages 112-136 of the record.

Statement of the Matter Involved

1. *The Collision*

These cases arose out of a collision on the high seas (R. 68) on December 16, 1942 between the United States Ship *YMS-12,* a Navy mine sweeper hereinafter generally called the *YMS-12,* and *SS. John Worthington,* a steam tanker owned and operated by petitioner, hereinafter generally called the *Worthington.*

It was found by both courts below that at the time of the collision the *YMS-12* was towing mine sweeps, was part of a formation of three minesweepers sweeping for mines in that area of the sea known as the "swept channel" marked by a line of buoys. R. 114, 151. The *Worthington* was outbound from New York in ballast. R. 115, 151. The weather was clear, visibility good. R. 115, 151. Both vessels were showing proper lights. R. 114, 115, 151.

It was conceded that the *YMS-12* was actually engaged in a warlike operation. R. 58, 114, 124-125, 160.

It was stipulated, and found by the District Court, that "The aforesaid collision was contributed to both by fault in the navigation of *SS. John Worthington* and fault in the navigation of the United States Ship *YMS-12,* consisting of failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and

the requirements of good seamanship under the circumstances." *Fifth Finding of Fact,* R. 115.

The *YMS-12* was damaged in said collision. The *Worthington* did not sustain any physical damage. *Sixth Finding of Fact,* R. 115.

2. *The Insurance*

At the time of the collision the *Worthington* was under requisition time charter to the United States. *Seventh Finding of Fact,* R. 115-116. Clause 20 of Part II of the Charter provided that the United States, as charterer, should provide and pay for war risk insurance on the vessel, and that petitioner, as owner, should assume or insure against all other risks or liabilities of whatever nature including those of a marine hull nature. *Charter,* Exhibit 1-A, Part II, page 9. R. 47.

Pursuant to said charter provisions the United States insured the petitioner with respect to the *Worthington* against war risks by means of a war risk endorsement on a form of marine hull policy. That form of policy did not exist as an actual policy of marine hull insurance.* It was the "attached policy" referred to in the war risk endorsement, a form which provided the basis for the war risk endorsement.

The provisions of the F. C. & S. clause of the marine hull policy form, material here, were as follows:

> *"F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance*

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* The Court of Appeals stated in the opinion that "Standard took out a normal marine hull policy which contained an F. C. & S. clause, excluding from its coverage war risks." *Opinion,* R. 152. That is not an accurate statement and there is no basis for it in the evidence. The fact is that petitioner was not insured as to marine risks. It elected to assume such risks.

*is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *.*

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

Form of Policy, Government Exhibit 1-C (p. 588 of reprint); *Tenth Finding of Fact,* R. 118-119.

The Collision Clause of the marine hull policy form covered liability arising from collision, and under certain conditions, the costs of defense. *Form of Policy,* Government Exhibit 1-C (p. 593 of reprint); *Tenth Finding of Fact,* R. 119-20.

The war risk endorsement was as follows:

"War Risk Clauses

Endorsement to be attached to and to be made part of Policy No. .....

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

* * * * * *"

War Risk Clauses, Government Exhibit 1-C (p. 594 of reprint); *Eleventh Finding of Fact,* R. 120.

3. *Proceedings below*

The case began in the United States District Court for the Southern District of New York with the collision libel

of respondent, in the action first above entitled. Petitioner pleaded a defense and set-off based on the war risk insurance issued by respondent to petitioner. Petitioner also filed a libel against respondent, second above entitled, based on the same insurance for recovery of any amount as to which petitioner might be held liable to respondent, together with all costs of defense of the collision libel.

The District Court held that the collision was a consequence of the warlike operation of the *YMS-12;* that petitioner was entitled to a set-off by reason of the war risk insurance by respondent of its collision liability; dismissed the collision libel of respondent by reason of said war risk insurance set-off, and allowed petitioner recovery against respondent of any and all costs of defense with respect to said collision libel, with interest and costs. *Decree,* R. 125, 137-138.

The judgments of the United States Court of Appeals for the Second Circuit, as to which review is now sought, reversed the decision and decree of the District Court in both actions. *Judgments,* R. 162-163. The Court of Appeals noted the concession below that the *YMS-12* was engaged in a warlike operation at the time of the collision, (R. 160), but held, in effect, that said warlike operation was not the effective cause of this accident (*Opinion,* R. 160-161); and further held that it was unnecessary to consider the further question as to war risk insurance of petitioner's collision liability. *Opinion,* R. 161.

Jurisdiction

The jurisdiction of this Court to review these cases on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

Questions Presented

1. Is a collision between a war vessel engaged on a warlike operation and a merchant vessel, with fault on the part of both vessels, a consequence of the warlike operation of the war vessel?

2. If the answer to the foregoing question is affirmative, is the collision liability of the owner and operator of the merchant vessel covered by the war risk insurance here involved?

3. If the answers to both the foregoing questions are affirmative, is respondent liable under such war risk insurance to indemnify petitioner against the costs of defense of the collision libel?

Reasons for Allowance of Writ of Certiorari

1. *As to the first question:*

(a) The decision of the United States Court of Appeals for the Second Circuit is in direct conflict with the decision dated April 9, 1949 of the United States Court of Appeals for the Ninth Circuit on a similar matter in *General Insurance Co. of America* v. *Link et al.* (*The Eastern Prince-USS Roustabout*), 173 F. 2d 955. Such conflict is one of the principal reasons, stated in Rule 38-5-(b) of this Court, for granting a writ of certiorari.

(b) The decision of the Court of Appeals will affect the determination of a similar question in a large number of pending litigated cases. A list of some of such cases is attached hereto as an Appendix. The New York Times on January 6, 1950, page 43, quoted Edwin L. Smith, Esq.,

Special Assistant to the Attorney-General, 45 Broadway, New York, who was of counsel for respondent below, as stating that he believed that there were seventy-five or eighty cases in the Southern District of New York on which the decision of the Court of Appeals below had a bearing. In *Alcoa Steamship Co.* v. *United States,* (1949) 338 U. S. 421, a writ of certiorari was issued for a similar reason.

(c) The first and second questions presented are of great importance in the field of marine insurance. The form of marine policy and war risk endorsement here involved was the standard form of war risk insurance prepared and issued by the Government with respect to vessels requisitioned by the United States and operated under the 1942 form of requisition time charter. *Charter, Part II, Clause 20,* Government Exhibit 1-A; *War Risks Binder,* Government Exhibit 1-B; *Standard Form of Hull Policy (Form 7) with War Risk Endorsement (Form 7A),* Government Exhibit 1-C; *Stipulation of Facts,* Government Exhibit 1, R. 47.

This Court has not yet dealt with war risk insurance which covers "all consequences of hostilities or warlike operations" where one of the vessels in collision was actually engaged on a warlike operation.

(d) The Court of Appeals erred in refusing to observe the admonition of this Court in *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli),* (1924) 263 U. S. 487, 493, as to conformity with the marine insurance laws of England; and in thus refusing to follow the decisions of the House of Lords in *Attorney General* v. *Adelaide Steamship Co. Ltd. (The Warilda),* [1923] A. C. 292, and *Board of Trade* v. *Hain Steamship Co. Ltd. (The Roanoke-The Trevanion),* [1929] A. C. 534.

(e) The decision of the Court of Appeals below is in direct conflict with the English decisions above mentioned. Conflict with an English decision in the Court of Queen's Bench was the basis for issuance of a writ of certiorari in *Aetna Ins. Co.* v. *United Fruit Co.*, (1938) 304 U. S. 430, 434. *A fortiori* here, where the decision below is in conflict with decisions of the House of Lords.

2. *As to the second question:*

If the collision was a consequence of the warlike operation of the *YMS-12*, then because of the judgments reversing the decree of the District Court, R. 162-163, there exists the second question above stated, although the Court of Appeals found it unnecessary to consider it in view of the reversal as to the first question. R. 161. The question as to the insurance of petitioner's collision liability by the war risk insurance provided by the Government under the 1942 requisition time charter is of great importance. We are not aware of any American decision on the point save that of the District Court herein.

Said second question is involved in many pending litigations against respondent under the form of war risk insurance here found. Referring to the list attached as an appendix hereto, the cases involving the second question are marked by an asterisk.

If the answer to the first question be affirmative, the answer to said second question should be settled by this Court.

3. *As to the third question:*

This question arises because of the reversal by the Court of Appeals of the decree of the District Court in the second case above entitled. R. 163. It is subordinate to and depends upon the disposition of the second question.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgments herein of the United States Court of Appeals for the Second Circuit.

Dated: New York, March 8, 1950.

STANDARD OIL COMPANY OF NEW JERSEY,

By EDWIN S. MURPHY,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IRA A. CAMPBELL,
Of Counsel.

APPENDIX

Litigated cases affected by the decision of the Court of Appeals for the Second Circuit herein.

UNITED STATES COURT OF CLAIMS

No. 46984. Libby, McNeil & Libby, a corporation, *vs.* United States. Decided January 3, 1950. Petition for Writ of Certiorari to be filed. Stranding, January 13, 1942.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

*A.131-311. Panama Transport Company, as owner of Tank Vessel *Standard,* against the United States of America. Collision on July 4, 1942 with SS. *Empire Antelope.*

*A.133-112. American-Hawaiian Steamship Company, as owner of SS. *Montanan vs.* U. S. A. Second cause of action. Collision with SS. *Algonquin* on October 9, 1942.

*A135-298. Standard Oil Company of New Jersey, former owner of American Steamship *F. Q. Barstow,* against the United States of America. *A.135-299. Panama Transport Company, chartered owner of Belgian motor tanker *Esso Belgium,* against the United States of America. Collision on Oct. 25, 1942 between the *F. Q. Barstow* and the *Esso Belgium.*

*A134-169. Standard Oil Company of New Jersey, as owner of SS. *Esso Charleston,* against the United States of America. Collision on Dec. 31, 1942 with SS. *West Madaket.*

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* Cases marked with asterisk involve war risk insurance of collision liability.

(Appendix, continued)

*A.134-201. Standard Oil Company of New Jersey, as owner of SS. *Thomas H. Wheeler*, against the United States of America. Collision on Jan. 2, 1943 with SS. *Thomas P. Beal.*

*A.134-294. Standard Oil Company of New Jersey, as owner of SS. *F. Q. Barstow*, against the United States of America. Collision on Jan. 20, 1943 with M. S. *Bronnoy.*

*A.135-180. Panama Transport Company, as owner of the M.T. *Orville Harden vs.* U. S. A. Collision with SS. *John A. Dix* on March 4, 1943.

A.136-199. Standard Oil Company of New Jersey, as owner of *Frederic R. Kellogg*, against the United States of America. Collision on May 10, 1943 with U. S. Destroyer *Borie.*

*A.137-6. Standard Oil Company of New Jersey, as owner of SS. *Beacon*, against the United States of America. Collision on June 15, 1943 with SS. *Delnorte.*

*A.137-13. Standard Oil Company of New Jersey, as owner of SS. *Walter Jennings*, against the United States of America. Collision on June 20, 1943 with SS. *Woodlark.*

*A.135-388, A.138-11. Panama Transport Company, as owner of *J. H. Senior, et al.* against United States of *America.* Collision on August 18, 1943 with SS. *J. Pinckney Henderson.*

A.139-313, A.139-326. Standard Oil Company of New Jersey, as owner of Tank Vessel *Wallace E. Pratt*, against the United States of America. Collision on Nov. 26, 1943 with an unidentified vessel.

A.141-278. Standard Oil Company of New Jersey, as owner of Tank Vessel *Walter Jennings*, against the United States of America. Collision on Feb. 1, 1944 with U. S. S. *YF337.*

*A.141-39. Standard Oil Company of New Jersey, as owner of Tank Vessel *Esso Aruba*, against the United States of America. Collision on Feb. 14, 1944 with SS. *Steelore.*

(Appendix, continued)

A.155-226. Esso Standard Oil Company, as owner of SS. *Bayonne,* against the United States of America. Collision on March 4, 1944 with U. S. S. *Derrick YO 59.*

*A.142-194. Panama Transport Company, as owner of the M. S. *Franz Klasen vs.* United States of America. Collision with SS. *John Wise* on April 26, 1944.

*A.142-211. Standard Oil Company of New Jersey, as owner of SS. *Esso Charleston,* against United States of America. Collision on April 30, 1944 with SS. *Thomas W. Hyde.*

A.144-64. Standard Oil Company (N. J.) and Standard Oil Company of New Jersey, as interest may appear, against United States of America as insurer of the Tank Vessel *Esso Baytown.* Collision on July 7, 1944 with U. S. S. *Neosho.*

*A145-162. Panama Transport Company, as owner of *Esso Balboa,* against the United States of America. Collision on Sept. 19, 1944 with SS. *Mobilgas.*

A.148-118. Standard Oil Company of New Jersey, as owner of Tank Vessel *Esso Charleston,* against United States of America. Collision on Jan. 5, 1944, with Hulk *Frauncion 6* and on Jan. 6, 1944, with Hulk *Loire.*

C.19-487. Reconstruction Finance Corporation *vs.* Atlantic Mutual Insurance Co. *et al.* Loss of Cargo on SS. *Oregon* sunk after collision with U. S. S. *New Mexico* on Dec. 10, 1941.

A.160-78. Reconstruction Finance Corporation *vs.* Federal Insurance Company *et al.* Loss of and damage to cargo on SS. *Tamesis* in collision with SS. *Alcoa Guard* on March 7, 1943.

A.161-39. United States of America *vs.* Federal Insurance Company *et al.* Damage to cargo on SS. *Norluna* stranded October 24, 1942.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

THE DECISION HEREIN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH A RECENT DECISION ON A SIMILAR MATTER BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

In *General Ins. Co. of America* v. *Link, et al. (The Eastern Prince-USS Roustabout)*, (9 Cir. April 9, 1949) 173 F. 2d 955, the United States Court of Appeals for the Ninth Circuit held that a collision between a United States Navy tanker in charge of Navy personnel, engaged on a warlike operation, and a merchant vessel, both being at fault by negligent navigation, was the consequence of the warlike operation of the Navy tanker.

The facts of that collision were in all respects parallel to those of the present case. The *Roustabout* was in command of a naval lieutenant and was engaged in a series of voyages carrying Navy supplies between a Navy station at Seattle to the Navy section base in Sitka, Alaska, by way of the Inside Passage. At the time of the collision, while returning from Alaska to the Seattle station, the *Roustabout* carried miscellaneous military cargo. The Court held that the voyage was solely for a war purpose and constituted a warlike operation. The *Roustabout* was held at fault for navigating on the wrong side of the Inside Passage. The *Eastern Prince* was also found at fault for obscuring her running lights by deck cargo. The suit was for the damage sustained by the *Eastern Prince*, on war risk insurance provisions similar in all material respects to those found here, and recovery was allowed.

The Court of Appeals for the Ninth Circuit, finding an absence of direct authority by this Court on the question presented, followed the admonition of this Court in *Queen Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co.* (*The Napoli*), (1924) 263 U. S. 487, at p. 493, that "there are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." On authority of the decisions of the House of Lords in *Board of Trade* v. *Hain S. S. Co. Ltd.* (*The Roanoke-The Trevanion*), [1929] A. C. 534 and *Attorney-General* v. *Adelaide Steamship Co. Ltd.* (*The Warilda*), [1923] A. C. 292, the United States Court of Appeals for the Ninth Circuit held that the collision was a consequence of the warlike operation of *U. S. S. Roustabout* notwithstanding that both vessels were guilty of negligent navigation.

In both *The Eastern Prince-USS Roustabout, supra,* and the present case there was involved a Navy vessel actually engaged on a warlike operation; in both cases there was a collision between the Navy vessel engaged on a warlike operation and a merchant vessel; in both cases there was negligent navigation on the part of both vessels in the respective collisions. The cases are similar in all respects, with the added element in the present case that the negligence of the *YMS-12* was negligence "under the circumstances" which included the towing of mine sweeps and the sweeping of mines as part of a formation of mine sweepers. *Third and Fifth Findings of Fact,* R. 114-115. In the decision of the District Court below the following appears:

> "The negligence found to exist was negligence 'under the circumstances' of the special and extraordinary conditions existing—conditions created by the warlike operation of mine sweeping." *R.* 130.

The interpretation put by the Court of Appeals below on the Fifth Finding of Fact (R. 115, 161) fails to recognize that the words "under the circumstances" refer to all the facts theretofore stated in the stipulation of facts (R. 96-97) and in the Findings of Fact (R. 114-115).

In *The Eastern Prince-USS Roustabout* the negligence was ordinary navigating negligence. The same appears in *The Roanoke-The Trevanion* and *The Warilda, supra.* Thus the present case offers even a stronger basis for a finding that the warlike operation of the *YMS-12* was the dominant and effective cause of the collision.

The decision by the United States Court of Appeals for the Ninth Circuit in *The Eastern Prince-USS Roustabout, supra,* was cited in our brief below, and the Court of Appeals referred to that decision in the opinion. *R.* 158-159. The Court of Appeals below recognized that the conformity rule announced in *Queen Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli),* (1924) 263 U. S. 487, 493, and the English decisions in *The Warilda* and *The Roanoke-The Trevanion,* were the basis for the decision of the United States Court of Appeals for the Ninth Circuit in *The Eastern Prince-USS Roustabout, supra.* Nevertheless the Court below decided the question in a manner directly contrary to that decision of the United States Court of Appeals for the Ninth Circuit.

There is therefore a clear conflict of decision on the same matter between the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Ninth Circuit, thus supplying one of the principal reasons for writ of certiorari prescribed by Rule 38-5-(b) of this Court.

SECOND POINT

THE COURT OF APPEALS BELOW REFUSED TO FOLLOW THE ENGLISH DECISIONS AND THUS FAILED TO FOLLOW THE ADMONITION OF THIS COURT.

In *Queen Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487, 493, this Court by Mr. Justice Holmes announced the following principle:

> "* * * There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * *"

See also *The Eliza Lines*, (1905) 199 U. S. 119, 128. That principle was later mentioned by this Court in *Aetna Ins. Co.* v. *United Fruit Co.*, (1938) 304 U. S. 430. It has also been recognized by the Circuit Courts of Appeals in *N. Y. and Oriental S. S. Co.* v. *Federal Ins. Co.*, (2 Cir. 1930) 37 F. 2d 461, 463; *The Galileo*, (2 Cir. 1931) 54 F. 2d 913, 915; *Aetna Ins. Co.* v. *Houston Oil Transport Co.*, (5 Cir. 1931) 49 F. 2d 121, 124; *Aetna Ins. Co.* v. *United Fruit Co.*, (2 Cir. 1937) 92 F. 2d 576, 580; and in the District Court decisions of *Mellon* v. *Federal Ins. Co.*, (SDNY 1926) 14 F. 2d 997, 1004; *The Shodack*, (SDNY 1936) 16 F. Supp. 218, 219; *Stofey* v. *U. S.*, (MDPa., 1949) 87 F. Supp. 81, 83.

The decisions of the House of Lords in *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*), [1923] A. C. 292 and *Board of Trade* v. *Hain S. S. Co.* (*The Roanoke-The Trevanion*), [1929] A. C. 534 were cited to the Court of Appeals below and were discussed by the Court of Appeals in the opinion. *R.* 155-156. The opinion even quoted (*R.* 156) the remarks of Lord Shaw of Dunfermline in *The Warilda*, including the following language: (italics ours)

"* * * *The conduct may have been faulty, but it was a warlike operation although faultily conducted.* Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. *Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations.*"

The opinion below also refers to *The Roanoke-The Trevanion,* where the *Trevanion,* a merchant vessel under requisition charter to the Crown, collided with the U. S. Navy mine planter *Roanoke.* The *Roanoke* was transporting a cargo of mines. The collision occurred at 8:20 P. M. on December 25, 1918 with both vessels showing regulation lights, solely by reason of negligent navigation of both vessels. The owner of the *Trevanion* sued the British Board of Trade as war risk underwriter, for damages sustained with respect to that vessel. The collision was held to be the direct consequence of the warlike operation of the *Roanoke,* notwithstanding the negligence of those in charge of both vessels, and the shipowner recovered.

The Court of Appeals below seems to suggest from time to time that negligence is an intervening cause which takes a loss out of the category of consequences of hostilities or warlike operations. *R.* 155, 160-161. That is directly contrary to the English authorities above cited. The contention that negligence was an intervening cause was expressly overruled in *The Warilda* and in *The Roanoke-The Trevanion, supra.* See also *Mazarakis Bros.* v. *Furness, Withy & Co.* (*The Kate-HMS Marshford*), (C. A. 1924) 18 Ll. L. L. Rep. 152.

In *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691 at page 716, Lord Porter summarized the English law as stated in *The Warilda* and in *The Roanoke-The Trevanion.* The Court of Appeals below quoted Lord Porter's summary in the opinion. *R.* 156.

It is likewise settled in this country that insurance against a specified peril is not affected by the cooperation or contribution of another cause, or of negligence contributory to the loss. *The Patapsco Insurance Co.* v. *Coulter,* (1830) 3 Pet. 222, 237; *Columbia Insurance Co.* v. *Lawrence,* (1836) 10 Pet. 509; *Waters* v. *The Merchants' Louisville Ins. Co.,* (1837) 11 Pet. 218, 221; *General Ins. Co.* v. *Sherwood,* (1852) 14 How. 361, 365; *Insurance Company* v. *Transportation Co.,* (1870) 12 Wall. 194; *Orient Insurance Co.* v. *Adams,* (1887) 123 U. S. 67, 72-73. See also *Arnould on Marine Insurance and Average* (12th Ed.) Vol. II, Secs. 798-799, pages 1059-1063.

The concept on which the English cases above cited were founded, was reflected in the observations of Lord Atkin in *The Coxwold,* [1942] A. C. at p. 701, and of Lord Wright in *Liverpool and London War Risks Association, Ltd.* v. *Ocean Steamship Co. Ltd. (The Priam),* [1948] A. C. 243, pp. 255-256 and 259.

In *The Priam, supra,* a case of sea water damage to cargo, a sharp distinction was drawn as to the rule governing cases of collision and stranding. Lord Wright said [1948] A. C. at page 257: (italics ours)

> "On the main issue, however, it seems to me that *there is a real difference of substance in this context between the ship striking a rock or colliding* and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her and that her striking the rock or

> colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an active agent quoad striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose. * * *"

And at page 259:

> "Outside of the particular concept of the 'warlike operation' or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, *except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' ship, being actively directed into the obstacle on her warlike course:* for other cases a purely marine loss due to heavy weather must still be held to be the liability of the marine underwriters. * * *"

The principle is therefore clear, that when a vessel is in motion through the water on a warlike operation, she is a moving instrument of war, and damage done by her while so engaged to another vessel, or to herself, is as much a direct consequence of her warlike operation as though it had been done by any other weapon or projectile of war. It makes no difference that negligence of those in charge of a vessel so engaged, or of both vessels in a given collision, may have contributed to the loss. The war risk underwriter of either vessel cannot escape liability on the ground of such negligence.

On the authority of *The Warilda, The Roanoke-Trevanion, The Coxwold,* and *The Eastern Prince-USS Roustabout,* the facts of the present case establish the necessary causation. It follows as a matter of law that the collision was a consequence of the warlike operation of the

war vessel, and that the warlike operation of the *YMS-12* was the dominant and effective cause of the collision herein.

The Court of Appeals below refused to follow these leading English cases on the erroneous premises that "the American rule is different", R. 156, and that "such a rule at best had its basis entirely in business expediency, and should not go beyond that." R. 159.

The Court reviewed the early American authorities and wrongly concluded that they establish a rule contrary to the decisions of the House of Lords in *The Warilda* and in *The Roanoke-The Trevanion.* *R.* 156-158.

The error of that conclusion lies in not recognizing that the term "war risk" in the Civil War charters and in later Government charters in the cases beginning with *Morgan* v. *United States,* (1871) 14 Wall 531 and ending with *New Orleans-Belize, Royal Mail and Central American Steamship Co. Ltd.* v. *United States,* (1915) 239 U. S. 202, (*R.* 157), had the limited meaning of *acts of the public enemy, or the casualties of war.* In those cases the Government, as charterer, assumed the "war risk". As none of those cases involved any act of the public enemy nor any casualty of war the Government was absolved from liability because it had assumed only "war risk".

The meaning of the term "war risk" was laid down in the decision of the Court of Claims in *Morgan* v. *United States,* (1869) 5 Ct. Cl. 182. There the vessel, carrying troops and military stores, was ordered by military authority to sail from port, over objection of her master because of low water on the bar. She was damaged by striking the bar. At pp. 189-190, the Court said: (italics ours)

> "1st. We are to inquire whether the damage to this vessel was the result of a 'war risk' assumed in

the charter-party by the United States. The term 'war risk' is an unusual one. I do not find it in the works on insurance or adjudged cases. In the case of *Bogert* v. *The United States,* (2C. Cls. *R.,* 159,) this court held that the terms in a policy in which the United States were the insurers could not be extended beyond *the 'acts of the public enemy' or 'the casualties of war;'* and that by its use the United States did not insure against their own acts. In that case the vessel was in the service under a valued charter-party, and containing the accruing clauses, with the right to purchase at the specified valuation. During the period of the vessel's service, to guard against the approach, or defeat the operations of the enemy, General Butler caused the vessel to be sunk in the James River, and it was held that this was not embraced within the meaning of a war risk, as used in the charter-party; that such an undertaking by the government is not an insurance against its own acts, although it destroyed the vessel for a war purpose. *To bring it within such a war risk as is assumed in this contract, the damage must have resulted directly, or proximately at least, from some act or operations of the public enemy.* Nothing of the kind exists here, and no obligation rests upon the United State[illegible] owing out of that clause in the charter-party."

See also *Bogert* v. *The United States,* (1866) 2 Ct. Cl. 159, where the vessel was deliberately sunk in the James River by General Butler's orders as noted in *Morgan* v. *United States* above quoted. The loss was not due to an act of the public enemy, nor was it found to be a "casualty of war". The Court said at p. 163: (italics ours)

"* * * I do not find that this general term 'war risk' has ever been employed in a policy of insurance, or, if so employed, that it has ever received a judicial interpretation. As employed in this contract, *we think that it cannot be extended so as to mean more*

than 'acts of the public enemy;' or, at the utmost, the casualties of war; and we think that it was never intended that the government should be placed on the same footing with the public enemy, or become an insurer against its own acts."

Compare *Baker* v. *United States,* (1867) 3 Ct. Cl. 76 where the vessel was stranded and lost by capture because the enemy gun fire of a Confederate shore battery shot away her anchor chain. The resulting stranding and loss, in sharp distinction to the other Civil War decisions cited by the Court below, was held due to "war risk".

The term "consequences of hostilities or warlike operations" is not a mere component formerly included in the term "war risk" as held by the Court of Appeals below. *R.* 152—Note 1. Its history shows that it was devised to expand the war risk cover and to extend it to cases of loss *in the nature of marine risk, which are consequences of war though not directly due to enemy acts.* Its development apparently began with the term "consequences of hostilities" as found in *Ionides* v. *The Universal Marine Ins. Co.,* (1863) 14 C. B. (N. S.) 259. The provision was later broadened in 1883 to include "warlike operations".

The history of the development of the phrase "all consequences of hostilities or warlike operations" was described in *Britain S. S. Co. Ltd.* v. *The King* (*The Petersham*), [1919] 2 K. B. at pp. 692-693. See also *Arnould on Marine Insurance and Average,* 12th Edition, Volume I, Sec. 10, pp. 18-19 and Volume II, Secs. 903-905f., pp. 1204-1219. It appears that it was not until 1898 that Lloyds published an F. C. & S. clause containing that provision. However, not all war risk insurance written thereafter contained that provision. Compare *Muller* v. *Globe and Rutgers Fire Ins. Co.* (*The Canadia*), (2 Cir. 1917) 246 Fed.

759 with *Standard Oil Company of New Jersey* v. *United States* (*The Llama*), (1925) 267 U. S. 76. So far as we have found, the earliest collision case in which that clause was considered was *British and Foreign S. S. Co. Ltd.* v. *The King* (*The St. Oswald-The Suffren*), [1918] 2 K. B. 879 where the loss of the *St. Oswald* was held to be the proximate, direct and immediate consequence of the warlike operation of the French Battleship *Suffren.*

Thus in the recent decision in the *Yorkshire Dale S. S. Co. Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691, at page 697, the Lord Chancellor said: (italics ours)

> "Before referring to other decisions of this House which bind us, I would call attention to the exact question raised by the terms of the charterparty in the present case. *The relevant contrast is not, strictly speaking, between marine risks and war risks.* The *Coxwold* accidentally stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat, and she consequently ran aground. No misfortune could be more marine in its nature than this, but *the question here is not whether this is a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as 'the consequence of warlike operations'.*"

To the same effect, Lord Wright in the same case, [1942] A. C. at p. 707.

The decision of this Court in *Queens Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co.* (*The Napoli*), (1924) 263 U. S. 487 was an important decision on the general subject but it did not decide the question here involved. While the insurance in that case contained the term "all consequences of hostilities or warlike operations", neither

vessel in that collision was found to have been engaged on a warlike operation. The decision was, in effect, that the collision between *The Napoli* and the *Lamington* was due to marine risk, not because it was due to negligence, but because neither of the merchant vessels involved were engaged on a warlike operation. The Court below recognized that point. *R.* 153.

Nor is there any conflict between the English rule and the recent American decisions in the lower courts. None of those American cases mentioned in the decision below, *R.* 157-158, involved a collision in which one of the vessels was engaged on a warlike operation; and in the standing case cited, the vessel was on a commercial voyage.

Against this background the Court below erroneously found that there is an American rule contrary to that stated by the House of Lords in *The Waritta* and *The Roanoke-The Trevanion.* The United States Court of Appeals for the Ninth Circuit in *The Eastern Prince-USS Roustabout,* (9 Cir. 1949) 173 F. 2d 955, stated that this Court has had before it no case like the one there involved and that in the absence of authority from this Court, the English rule should be applied pursuant to the conformity rule announced by Mr. Justice Holmes in *The Napoli.*

Erroneous theory carried the Court of Appeals below even to the extent of holding that the case of *Meseck Towing Lines, Inc.* v. *Excess Ins. Co. Ltd.,* (EDNY 1948) 77 F. Supp. 790 was "on facts almost identical to those involved here." *R.* 161. The Court below overlooked the point that the submarine chaser involved in the *Meseck* collision had left her station at sea to return to port for fuel and was maneuvering in New York Harbor when the collision occurred. The decision in the *Meseck* case was that the

submarine chaser was not engaged on a warlike operation at the time of collision.* The error of the Court of Appeals below is plainly shown by its reference, in the fourth and fifth lines of page 161 of the record, to the "warlike character of the operation" in the *Meseck* case.

The Court then went on to consider the fact that British underwriters in 1942 changed the form of their F. C. & S. clause. But changes made by foreign underwriters in the form of their contracts have nothing to with with the legal interpretation of the form of contract here found. Further, the conformity rule as announced by Mr. Justice Holmes of this Court, has been uniformly regarded as based on the legal desirability of conformity of decisions in the United States in marine insurance matters with decisions of the English courts and with the laws of England. See cases cited, *ante*, p. 16.

It is suggested in the opinion of the Court of Appeals below, *R.* 158, that if the British rule were followed, "there would be no point in the taking out of marine insurance by ships devoted to missions of war, since the war risk insurance provided by the Government would cover any losses they might incur." That statement seems to relate to another kind of case. The point here is not as to "taking out of marine insurance by ships devoted to missions of war", but the reverse of that, i.e., war risk insurance on a

*The official report of the *Meseck* decision, 77 F. Supp. 790 is incomplete. It sets forth only what the Court included under the heading "Discussion". The findings of fact and conclusions of law, referred to at the end of the opinion, are not contained in the official report. These will be found at 1948 AMC 979-982. The fourth "conclusion of law" was as follows:

> "4. The collision with the *Frederick E. Meseck* in March 1944, inside the Narrows, occurred during one of the periodic relief periods of the *SC 1294*, before she had resumed her patrol duties, and at the time of collision the *SC 1294* was not engaged in a warlike operation."

merchant vessel *not* devoted to a mission of war. It has never been suggested by petitioner herein that such "war risk insurance should provide complete coverage for the vessel" as it is later put in the same paragraph of the opinion.

There is therefore no American rule in conflict with the rule announced by the English authorities, and the other considerations expressed in the opinion below are not applicable.

The Court of Appeals below erroneously refused to follow the conformity rule announced by this Court in *The Napoli.*

THIRD POINT

THE COLLISION LIABILITY OF PETITIONER AND THE COSTS OF DEFENSE OF THE COLLISION LIBEL ARE COVERED BY THE WAR RISK INSURANCE HERE INVOLVED.

If the first question presented by the foregoing petition is answered by this Court affirmatively, then there arises the important question of the war risk insurance of the collision liability of petitioner to respondent with respect to the damages sustained by the *YMS-12,* the collision having been due to mutual fault.

The second and third questions stated in the foregoing petition were decided in favor of petitioner by the District Court. *R.* 130-136; *Decree, R.* 137-138.

Having reversed the District Court on the first question, the Court of Appeals below held in effect that the war risk insurance never came into operation at all. It was thus stated to be unnecessary for the Court of Appeals to deal

with the second question here presented. *R.* 161. The same would apply to the third question.

As to the second question, we do not know of any American decision save that of the District Court herein. *R.* 130-136.

The only authority abroad appears to be that of the House of Lords in *Adelaide Steamship Co. Ltd.* v. *The Crown,* [1926] A. C. 172. That was the second reported decision in which the House of Lords dealt with the collision between the *Warilda* and the *Petingaudet,* and is commonly known as the *Second Warilda.* It was held that the form of war risk insurance there involved did not cover the collision liability of the *Warilda* to the *Petingaudet.*

The war risk endorsement in the present case is written on an entirely different form, *ante,* p. 4. *R.* 120. It expressly refers to the collision liability of petitioner by the phrase "(including the Collision Clause)". That phrase was not found in the insurance provisions involved in the *Second Warilda* and was apparently designed, in full light of the *Second Warilda,* to avoid the effect of that decision. It marks a sharp distinction between the *Second Warilda* and the present case.

The second paragraph of the F. C. & S. Clause, *R.* 134, *ante,* pp. 3-4, provides that the war risk endorsement shall "supersede" the F. C. & S. warranty "to the extent that their terms are inconsistent." It is in effect a subordination clause which subjects the exclusions of the F. C. & S. Clause to the control of the war risk endorsement. The war risk endorsement is thus made the dominant clause. As to the term "(including the Collision Clause)", it is "inconsistent" with the F. C. & S. Clause. The war risk endorsement directs that the risks excluded from the attached marine hull policy form by the F. C. & S. Clause shall include

the risks covered by the Collision Clause. The provision "(including the Collision Clause)" supersedes and must be read into, the F. C. & S. Clause; and being thus carried back into the F. C. & S. Clause by the effect of the subordination clause, operates to include the risks covered by the Collision Clause among all other risks excluded from the marine hull insurance in any casualty which is a "consequence of hostilities or warlike operations". The war risk insurance then covers all such risks so excluded, among them those of the Collision Clause.

As held by the District Court, R. 134, 135, the subordination clause requires that the exclusions of the F. C. & S. Clause must be read as co-extensive with the undertaking contained in the war risk endorsement; and the purpose of the "subordination clause" was to make the exclusions of the F. C. & S. Clause commensurate with what was assumed by the war risk endorsement.

There is no ground for argument here, as held in the *Second Warilda*, that the collision liability of petitioner was due only to negligence, and thus not within the cover of the war risk insurance, because the present war risk endorsement specifically refers to and insures the risks covered by the Collision Clause, which covers loss due to liability. Liability arises only by reason of fault or negligence. Therefore the war risk endorsement, unlike that found in the *Second Warilda*, expressly provided for insurance of a loss by reason of liability due to negligence.

Nor is there any basis for a contention that the insurance provided by the war risk endorsement did not reach the risks covered by the Collision Clause as was held in the *Second Warilda*. In that case it was held ([1926] A. C. at pp. 179-182) that the Collision Clause was an addition to the basic marine hull policy; that the F. C. & S. Clause operated only on the risks covered by the "ordinary English

policy of marine insurance"; that the "special contr contained in the Collision Clause" was not excluded from the policy by the provisions of the F. C. & S. Clause, and therefore was not covered by clause 19, the war risk clause, of the charter. Here the war risk endorsement contained a new provision, lacking in clause 19 of the *Warilda* charter, viz., the phrase "(including the Collision Clause)". That phrase supplied a definite provision that the risks excluded from the marine hull policy by the terms of the F. C. & S. Clause, were to include those covered by the Collision Clause, thus bringing the latter within the cover of the war risk endorsement.

It was on the distinction between the insurance provisions found in the *Second Warilda*, and those of the present case that the District Court decided that the present war risk insurance covered petitioner's collision liability and thus allowed to petitioner the set-off provided by the decree below. *Decision*, R. 130-136; *Decree*, R. 137-138.

The third question presented by the foregoing petition, as to respondent's liability to petitioner under the Collision Clause for the costs of defense of the collision libel, depends on the answer to the second question, and on the facts found by the District Court. R. 116-124. We have not found any decision as to the third question. It involves the unusual situation in which an underwriter sues the assured on a claim covered by the insurance issued by the underwriter to the assured. If any notice was necessary it was contained in our letter dated December 7, 1945 to War Shipping Administration. R. 121-122. If the answer to the second question is affirmative, the third question should be answered affirmatively as a matter of course. R. 136.

CONCLUSION

THE QUESTIONS STATED IN THE PETITION SHOULD BE SETTLED BY THIS COURT.

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Dated: New York, March 8, 1950.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 27

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, as Owner of the United States Ship *YMS-12.*

No. 28

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker *John Worthington,*
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 27

STANDARD OIL COMPANY OF NEW JERSEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, as Owner of the United States Ship *YMS-12.*

No. 28

STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steam Tanker *John Worthington,*

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported in 81 F. Supp. 183 and appears at pages 78-95 of the record.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 178 F. 2d 488 and appears at pages 102-114 of the record.

These cases were consolidated for purposes of trial and appeal, R. 95, 104.

Jurisdiction of This Court

This Court issued writs of certiorari on June 5, 1950, 339 U. S. 977.

The jurisdiction of this Court rests upon the provisions of Title 28 U. S. Code, Section 1254.

Questions Presented

1. Is a collision between a war vessel engaged on a warlike operation and a merchant vessel, with fault on the part of both vessels, a consequence of the warlike operation of the war vessel?

2. If the answer to the foregoing question is affirmative, is the collision liability of the owner and operator of the merchant vessel covered by the war risk insurance here involved?

3. If the answers to both the foregoing questions are affirmative, is respondent liable under such war risk insurance to indemnify petitioner against the costs of defense of the collision libel?

Statement of the Case

These actions in Admiralty arose out of a collision at sea between the steam tanker *John Worthington*, hereinafter called the *Worthington*, and United States Navy

Minesweeper *YMS-12,* hereinafter called the *YMS-12,* between 5 and 6 A. M. on December 16, 1942.

The *Worthington* did not sustain any damage in the collision. The *YMS-12* sustained serious damage.

There is no issue as to fault in the collision. It was stipulated before trial that the collision was contributed to by fault on the part of both vessels under the circumstances. Thus petitioner was liable in the first instance for one half of the *YMS-12's* collision damages.

The only question before this Court is as to war risk insurance of petitioner's collision liability with respect to the damages sustained by the *YMS-12.*

The war risk insurance of petitioner with respect to the *Worthington* was issued by the Government, respondent herein.

In No. 27 the District Court sustained petitioner's defense, and in effect allowed petitioner a full set-off against said liability, and in No. 28 allowed petitioner to recover the costs of defense of respondent's collision libel (No. 27), by reason of said war risk insurance.

The United States Court of Appeals for the Second Circuit reversed on the ground that the collision was not within the terms of said war risk insurance and that thus it was unnecessary to consider whether petitioner's resulting liability is insured thereby.

(a) *The Pleadings*

Respondent's collision libel filed against petitioner in No. 27 claims approximately $150,000 for damages sustained with respect to the *YMS-12. Libel,* Article Fourth, R. 5.

Petitioner's answer to said collision libel pleaded a defense based on the terms of war risk insurance issued by

respondent to petitioner with respect to the *Worthington*, and accordingly prayed dismissal of the collision libel by reason of respondent's liability to petitioner under said war risk insurance. *Answer*, Article Eighteenth and concluding paragraph, R. 14-15.

In No. 28 petitioner's cross-libel claims indemnity pursuant to said war risk insurance with respect to any loss which petitioner may sustain by reason of liability arising out of said collision, and for any and all costs which petitioner has incurred or shall incur in defense of the collision libel in No. 27. *Libel*, Articles Eighteenth and Twenty-first, R. 25-26.

(b) *The Collision*

On a stipulation of facts, the District Court, with the consent of all parties, found the facts as to the collision as follows (italics ours):

> (1) At all material times the United States of America owned and operated the United States Ship *YMS-12*, a mine sweeper of the United States Navy, manned and commanded by the United States Naval personnel, and Standard Oil Company of New Jersey owned and operated the Steamship *John Worthington*, a tank ship.
>
> (2) Between 5:00 and 6:00 a.m. on December 16, 1942, a collision occurred between the United States Ship *YMS-12* and S. S. *John Worthington* in buoyed channel otherwise known as the swept channel in the approaches to the New York harbor. Said channel was marked by center line bucys from a point about twenty-three miles off Point Pleasant on the New Jersey Coast at Buoy A, Lat. 40 deg. 04′ 50″ N; Long. 73 deg. 31′ 45″ W, to a point in vicinity of Ambrose Light Vessel, at Buoy I, Lat. 40 deg. 26′ 46″ N; Long. 73 deg. 51′ 51″ W.

(3) At the time of the collision the *YMS-12* was part of a mine sweeping formation and was proceeding seaward with her mine sweeping gear streamed and displaying three all around green lights designating mine sweeping vessels towing mine sweeps in accordance with notice to mariners issued July 1, 1942, in addition to her regular running lights. Said mine sweeping formation consisted of three mine sweepers which were engaged in mine sweeping in said buoyed channel. The U. S. S. *YMS-105* was the guide ship of the formation, which was proceeding on the easterly side of the swept channel, keeping the mid-channel buoys on the port hand. The *YMS-12* was stationed several hundred yards on the starboard beam of the *YMS-105* and the third vessel in the formation, the USS *AMC-95,* was echelon to the right of the guide ship in a position approximately a half mile astern of and midway between the *YMS-105* and the *YMS-12.*

(4) At the time of the collision, SS *John Worthington* was outbound from New York in ballast and was proceeding to sea in convoy, displaying regular and proper lights. The weather was clear, visibility good.

(5) The aforesaid collision was contributed to both by fault in the navigation of SS. *John Worthington* and fault in the navigation of the United States Ship *YMS-12,* consisting of failure on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship *under the circumstances.*

(6) SS. *John Worthington* did not sustain any physical damage but the *YMS-12* did sustain damage as a result of the collision.

Findings of Fact, R. 79-80.

It was conceded by the Government that at the time of the collision the *YMS-12* was actually engaged in the war-

like operation of mine sweeping, R. 40, 42, and it was so found by both Courts below. R. 86, 112.

(c) *The Insurance*

At the time of the collision the *Worthington* was under requisition time charter to the United States. Clause 20 of Part II of that Charter provided that the United States, as charterer, should provide and pay for the war risk insurance on the vessel, and that petitioner, as owner, should assume or insure against all other risks or liabilities of whatever nature including those of a marine hull nature. *Charter*, Ex. 1A, Part II, p. 9. R. 70, in evidence as Exhibit A attached to Stipulation of Facts, Government Exhibit 1, at R. 32. The full text of the charter will be found in the exhibit volume, the photostat being marked Exhibit A, headed Form No. 102, *Warshipoiltime* 5/22/42, Counterpart III, Parts I and II.

The insurance of damage to a vessel is usually covered by the *Adventures and Perils Clause* of the ordinary marine hull policy. The insurance of liability for damage to other vessels is usually covered by the *Collision Clause* of the ordinary marine hull policy.

Any claim for loss, damage or expense caused by or resulting from the consequences of hostilities or warlike operations is usually excluded from the marine hull policy by a clause in such policy known as the "Free of Capture and Seizure Clause" (commonly called the F. C. & S. Clause) which *excludes* from the marine policy all such risks including "all consequences of hostilities or warlike operations."

There may then be added to the marine policy a "war risk endorsement", or a separate policy issued, which insures all risks excluded from the marine policy by the F. C. & S. Clause.

In the present case, pursuant to the provisions of Clause 20 of Part II of the Requisition Time Charter, petitioner elected to assume all ordinary marine risks. It did not take out any marine hull policy.*

The war risk insurance called for by the *Worthington* charter was written by a combination of documents and provisions prescribed and promulgated by respondent; viz., (1) a war risks binder; (2) the W. S. A. standard form of marine hull policy containing an Adventures and Perils Clause, a Collision Clause, and an F. C. & S. Clause, to which was attached (3) a war risk endorsement by which the United States insured the risks excluded from the marine hull policy by the F. C. & S. Clause.

The War Risks Binder contained the following clauses:

> "'3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. * * *
>
> * * * * * * *
>
> Endorsement No. 1.
>
> '2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.'"

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*The form of marine hull policy here involved was not issued as an actual policy of marine hull insurance. It was the "attached policy" referred to in the war risk endorsement. It was the form referred to in the War Risks Binder, and which provided the basis for the war risk insurance here involved. The Court of Appeals stated in the opinion that "Standard took out a normal marine hull policy which contained an F. C. & S. clause, excluding from its coverage war risks." *Opinion*, R. 101. That is not an accurate statement and there is no basis for it in the evidence, nor in the Twelfth Finding of Fact, R. 84, as suggested by Government counsel in brief in opposition to petition for writs of certiorari herein.

War Risks Binder, Eighth and Ninth Finding of Fact, R. 81-82; Exhibit 1-B, R. 32; Exhibit B in exhibit volume.

The form of standard marine hull and war risk policy referred to in said binder and charter, as prescribed by War Shipping Administration at the time of this collision, contained a *"Full collision—Sister-ship collision"* clause, relating to liability arising from collision and under certain conditions the costs of defense, as follows:

> *"Full collision—Sister-ship collision.* And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *"

Form of Policy, Ex. 1-(c), R. 71-72, in evidence, R. 32; *Tenth Finding of Fact,* R. 83.

Said marine hull policy form also contained an F. C. & S. Clause (in italics) which excluded from the

form of marine hull policy any claim for loss, damage or expense caused by or resulting from, among other things, "all consequences of hostilities or warlike operations." The provisions of the F. C. & S. Clause, material here, were as follows:

> *"F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *."*

Attached to the F. C. & S. Clause and printed in italics with it, was a paragraph which subordinated the F. C. & S. Clause to any war risk indorsement later added, as follows:

> *"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."*

Form of Policy, Government Ex. 1-(c), R. 71 in evidence, R. 32; *Tenth Finding of Fact*, R. 82.

The risks excluded from the form of marine hull policy by the F. C. & S. Clause were insured by respondent by means of a war risk endorsement attached to said marine hull policy form. Said war risk endorsement contained, among others, the following provisions:

> "War Risk Clauses.
>
> Endorsement to be attached to and to be made part of Policy No. .....
>
> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the

F. C. & S. warranty contained therein but which are excluded by that warranty."

War Risk Clauses, Eleventh Finding of Fact, R. 83-84; Government Ex. 1-(c), R. 72, in evidence R. 32.

The full text of the form of marine policy (Form No. 7) with form of War Risks endorsement, Form No. 7A, will be found marked Exhibit C in the Exhibit Volume, being a photostat of the standard forms of marine hull policy and war risk endorsement published by War Shipping Administration in a volume entitled "Compilation of Standard Contract Forms of the War Shipping Administration," Washington, 1945, pp. 586-595.

It was part of the agreed findings of fact that said War Risks Binder and all said insurance provisions were in effect at the time of the collision; that petitioner duly performed all the terms and conditions of said charter and insurance contract on its part to be performed and did not carry any other insurance as to the *Worthington. Eighth to Twelfth Findings of Fact,* inclusive, R. 81-84.

By letter of December 7, 1945, petitioner notified respondent, through the Insurance Division of War Shipping Administration, that any liability on petitioner's part or on the part of the *Worthington* is covered by said war risks binder and insurance, and asked respondent's consent as war risk underwriter that the libel in No. 27 be defended for respondent's account. In the same letter petitioner informed respondent that petitioner would look to it for full indemnity as to any and all liability in the premises, and as to all costs of defense incurred by petitioner in defense of respondent's collision libel. *Letter,* Exhibit A, R. 76 in evidence R. 55; *Thirteenth Finding of Fact,* R. 84-85.

The Government's reply dated December 14, 1945 among other things, denied that the Government was concerned in the petitioner's claim; and stated in effect that any claim or suit by the United States as owners of the Ship *YMS-12*, in which the Division of Maritime Insurance might prove to be concerned, *would be waived. Letter*, Exhibit B, R. 77 in evidence R. 55; *Fourteenth Finding of Fact*, R. 85-86.

The waiver* referred to in that letter is the basis for dismissal by the District Court of respondent's collision libel in No. 27 (*Decree*, R. 95-96) in view of its adjudicated liability under the war risk insurance, thus, in effect, granting petitioner a full set-off and avoiding unnecessary circuity of action.

(d) *The issues*

The principal issues in these cases are therefore the same,—

(1) whether the collision at sea between the *Worthington* and the *YMS-12* actually engaged in the warlike operation of mine sweeping was a consequence of the *YMS-12's* warlike operation within the provisions of the war risk insurance of the *Worthington*, and

(2) whether such war risk insurance covered petitioner's collision liability as owner and operator of the *Worthington*

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* See Interdepartmental Waiver promulgated by War Shipping Administration in Legal Bulletin W. S. A. No. 23, Part II, dated January 14, 1943:

> "II. *Inter-Departmental Claims*
>
> Generally stated, it can be said that all types of maritime claims in favor of or against a Government department or agency, such as War Shipping Administration, Army, Navy, Lend-Lease Administration, etc., which claims are in turn for or against another United States Government department or agency, are to be waived and will not be asserted or pressed to final conclusion. * * *"

for the collision damages sustained by and with respect to the *YMS-12*.

No. 28 involves a further question of law as to whether said war risk insurance covered also the costs of defense incurred by petitioner in defending the collision action, No. 27.

Specification of Errors

The United States Court of Appeals for the Second Circuit erred—

1. In failing to hold that the collision was a consequence of the warlike operation of mine sweeping on which the Navy Minesweeper *YMS-12* was concededly engaged at the time of the collision.

2. In holding, although it is conceded that the *YMS-12* was engaged in the warlike operation of mine sweeping at the time of the collision, that the stipulated facts failed "to show that the loss was a consequence of hostilities." R. 112-113.

3. In refusing to follow the decisions of the House of Lords in *Board of Trade* v. *Hain Steamship Co. Ltd. (The Roanoke-The Trevanion)* [1929] A. C. 534 and *Attorney General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292, despite the admonition of this Court in *Queens Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 at page 493.

4. In holding that said admonition "at best had its basis entirely in business expediency, and should not go beyond that." and that "Here all demands of business expediency must be held to have ceased because the British underwriters in 1942 changed the form of their F. C. & S. clause and war risk clause * * *". R. 111.

5. In holding that the American authorities are contrary to the rule stated in the English decisions above cited.

6. In holding that the collision was *due to* the faulty navigation of the two vessels. R. 103.

7. In construing Article 5 of the Stipulation of Facts, Government Exhibit 1, R. 69, in evidence R. 32, *(Fifth Finding of Fact,* R. 80), as showing an agreement that *the cause* of the collision was failure on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship, R. 113.

8. In failing to hold that the stipulated negligence was only *contributory to* the collision.

9. In failing to accept the finding of the District Court, R. 90, that "the negligence found to exist was negligence 'under the circumstances' of the special and extraordinary conditions existing—conditions created by the warlike operation of mine sweeping."

10. In reversing, and failing to affirm, the decision and decree of the District Court which sustained petitioner's defense and dismissed the libel in No. 27, and allowed petitioners to recover in No. 28 the costs of defense incurred in No. 27. (R. 114.)

Summary of Argument.

I.

This collision occurred at sea between a merchant vessel and a United States Navy minesweeper actually engaged in the warlike operation of mine sweeping.

Under such circumstances the collision is a consequence of a warlike operation within the meaning of the phrase "all consequences of hostilities or warlike operations" as

found in the present war risk insurance, not withstanding that negligent navigation of both vessels contributed to the loss. *General Ins. Co. of America* v. *Link et al., (The Eastern Prince-U. S. S. Roustabout)*, (9 Cir. 1949) 173 F. 2d 955.

In *Queens Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 this Court issued an admonition that "there are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business".

The United States Court of Appeals for the Ninth Circuit, governed by the admonition of this Court, followed the English rule in *General Ins. Co. of America* v. *Link, et al. (The Eastern Prince-U. S. S. Roustabout)*, (9 Cir. 1949) *supra*.

The decisions of the House of Lords hold that a vessel moving through the water on a warlike operation is a moving instrument of war, and damage actively done by her while so engaged, to another vessel or to herself, in collision or stranding, is a consequence of her warlike operation. It makes no difference that negligence of those in charge of a vessel so engaged, or of both vessels in a collision involving a vessel so engaged, may have contributed to the loss. The war risk underwriters of either vessel cannot escape liability on the ground of such negligence. *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292; *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)*, [1929] A. C. 534; *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691; *Liverpool and London War Risks Assn. Ltd.* v. *Ocean Steamship Co. Ltd. (The Priam)*, [1948] A. C. 243, 255, 256, 259.

At the time of the decision below there were no American authorities contrary to the English decisions above

cited. The early American cases involved only insurance of "war risk". The term "war risk" was therein adjudicated to mean only "act of the public enemy or, at the utmost, the casualties of war". The decision of this Court in *The Napoli, supra,* while involving "consequences of hostilities or warlike operations," did not decide the present question because the Court found that neither vessel in the collision was engaged on a warlike operation. The Court of Appeals below recognized the limited effect of *The Napoli* decision. The District Court decision of *Meseck Towing Lines, Inc.* v. *Excess Ins. Co.* (EDNY, 1948) 77 F. Supp. 790, in a collision between a tugboat and a submarine chaser, was based on a finding of fact that the submarine chaser was not engaged in a warlike operation at the time of collision.

The case of *Libby, McNeil & Libby, etc.* v. *United States* (Ct. Cl. 1950) 87 F. Supp. 866, and other cases decided after the decision of the Court of Appeals below, have no greater weight than the decision now under appeal.

The Court of Appeals below refused to follow the admonition of this Court in *The Napoli, supra,* and likewise the English rule, apparently holding, although it is not explicitly clear, that negligence on the part of both vessels was the proximate cause of the collision, a theory expressly rejected in *The Warilda* and *The Roanoke-The Trevanion*, above cited, and likewise rejected in *General Ins. Co.* v. *Link, et al.,* (9 Cir. 1949) *supra.*

The expression "cause nearest to the loss" as used in *Queen Ins. Co.* v. *Globe and Rutgers Fire Ins. Co. (The Napoli), supra,* is one of many forms of expression used by the Courts to describe the dominant and effective cause of the loss not necessarily the cause nearest as to place or time. *Insurance Co.* v. *Boon,* (1877) 95 U. S. 117; *Lamasa Fruit, etc. Co.* v. *Universal Ins. Co. (The Smaragd),* (1938) 302 U. S. 556, 562; *British and Foreign Steamship Co. Ltd.*

v. *The King (The St. Oswald-The Suffran)*, (1918) 2 K. B. 879, 890-1; *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society (The Ikaria)*, [1918] A. C. 350; *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691, 705-707.

Insurance against a specified peril is not affected by the cooperation or contribution of another cause or of negligence contributory to the loss. *The Patapsco Insurance Co.* v. *Coulter*, (1830) 3 Pet. 222, 237; *Columbia Insurance Co.* v. *Lawrence*, (1836) 10 Pet. 509; *Waters* v. *The Merchants' Louisville Ins. Co.*, (1837) 11 Pet. 218, 221; *General Ins. Co.* v. *Sherwood*, (1852) 14 How. 361, 365; *Insurance Company* v. *Transportation Co.*, (1870) 12 Wall. 194; *Orient Insurance Co.* v. *Adams*, (1887) 123 U. S. 67, 72-73.

The rule is the same in England. *Board of Trade* v. *Hain S.S. Co., Ltd.*, [1929] A. C. 534, 539, 544; *Attorney General* v. *Adelaide S.S. Co. Ltd.*, [1923] A. C. 292, 298, 300, 307-308; *Yorkshire Dale S.S. Co. Ltd.*, v. *Minister of War Transport*, [1942] A. C. 691, 711; *Trinder, Anderson & Co.* v. *Thames and Mersey* Mar. Ins. etc. (C. A.) [1898] 2 Q. B. 114, 123-24. See also *Arnould on Marine Insurance* (13th Ed.) Vol. II, Secs. 798-799, pages 718-720.

II.

The Court of Appeals below did not decide the question of war risk insurance of petitioner's collision liability because it held in effect that the war risk insurance did not come into operation. Nevertheless it reversed the decision and decree of the District Court in favor of petitioner on this question. R. 113.

The present war risk endorsement, prescribed and issued by the Government, respondent herein, is in form en-

tirely different from that found in *Adelaide Steamship Co. Ltd.* v. *The Crown* [1926] A. C. 172, the second *Warilda.**

The second paragraph of the F. C. & S. Clause of the marine hull policy form is in effect a subordination clause and was rightly so described by the District Court. R. 94. It subjected the F. C. & S. Clause to amendment by virtue of any "inconsistent" terms contained in a war risk endorsement to be later added to the policy form. Thus the F. C. & S. Clause, must be read as amended by the terms of the war risk endorsement, and as so amended, it excluded from the marine hull policy form any claim under the Collision Clause arising from any casualty which is a "consequence of hostilities or warlike operations", along with any other claim arising from such a casualty.

The present war risk endorsement expressly refers to and insures the risks, covered by the Collision Clause, which are excluded from the marine hull policy by the amended F. C. & S. Clause.

Petitioner's collision liability was therefor excluded from the marine hull policy form by the F. C. & S. Clause as so amended, and was taken over and insured by the war risk endorsement.

There were not any such provisions in the charter clause which provided the war risk insurance of the second *Warilda.* It was apparently included in the present war risk insurance in full light of the second *Warilda* and to avoid the effect of that decision. It thus marks a sharp distinction between the second *Warilda* and the present case.

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* That case is the second reported decision in which House of Lords dealt with the collision between *The Warilda* and *The Petingaudet*, and is commonly known as the second *Warilda*. For convenience it will be so referred to in this brief.

III.

The remaining question is as to petitioner's right to indemnity in No. 28 with respect to the costs of defense of respondent's collision libel in No. 27. The same provisions of the war risk insurance, prescribed and issued by respondent, which insured petitioner as to collision liability also insured petitioner as to the costs of defense of the collision libel in No. 27. Due notice was given by petitioner to respondent if any notice was necessary.

FIRST POINT.

THE COLLISION WAS A CONSEQUENCE OF THE WARLIKE OPERATION OF MINE SWEEPING IN WHICH THE *YMS-12* WAS THEN ENGAGED.

(a) *The admonition of this Court in The Napoli*

In *Queen Ins. Co. of America* v. *Globe and Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487 this Court dealt with a wartime collision between the *Napoli* and the *Lamington*.

The question was whether the damages to *The Napoli's* cargo were covered by war risk insurance which was treated as equivalent to insurance of "all consequences of hostilities or warlike operations."

It had already been held in England that sailing without lights and sailing in convoy, while sometimes described as "warlike precautions" (*The Warilda* [1923], A. C. 292, 300), did not alone constitute a "warlike operation" within the meaning of that term in policies of insurance. As it was said in *The Matiana* [1921], 1 A. C. 99, at page 109, "the warships which escort her convoy are engaged in a warlike operation but the merchant vessels in the convoy

are engaged in the peacelike operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding."

In *The Napoli,* neither vessel was carrying sufficient warlike cargo to give her voyage the character of a warlike operation. Following the English authorities, this Court held that neither the *Napoli* nor the *Lamington* were engaged on a warlike operation. Mr. Justice Holmes, at p. 493 of that decision, stated the principle of conformity to the marine insurance laws of England, as follows:*

> " * * * There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * * "

The Court of Appeals below, faced with the admonition of this Court, and finding as shall hereafter appear, that the English authorities were contrary to its own preconceptions, dismissed the *Napoli* admonition as a "dictum" of Mr. Justice Holmes (R. 110), and said that "such a rule at best had its basis entirely in business expediency, and should not go beyond that * * * ". R. 111. Following up the latter remark, the Court below said that all demands of the business expediency must be held to have ceased because the British underwriters in 1942 changed the form of their F. C. & S. clause and war risk clause, and concluded "Thus it is no longer necessary to conform to the supposed

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* See also *The Eliza Lines,* (1905) 199 U. S. 119, 128. That principle was later mentioned by this Court in *Aetna Ins. Co.* v. *United Fruit Co.,* (1938) 304 U. S. 430. It has also been recognized by the Circuit Courts of Appeals in *N. Y. and Oriental S. S. Co.* v. *Federal Ins. Co.,* (2 Cir. 1930) 37 F. 2d 461, 463; *The Galileo* (2 Cir. 1931) 54 F. 2d 913, 915; *Aetna Ins. Co.* v. *Houston Oil Transport Co.,* (5 Cir. 1931) 49 F. 2d 121, 124; *Aetna Ins. Co.* v. *United Fruit Co.,* (2 Cir. 1937) 93 F. 2d 576, 580; and in the District Court decisions of *Mellon* v. *Federal Ins. Co.,* (SDNY 1926) 14 F. 2d 997, 1004; *The Shodack,* (SDNY 1936) 16 F. Supp., 218, 219; *Stofey* v. *U. S.,* (MDPa., 1949) 87 F. Supp. 81, 83.

British rule in order that the same language shall mean the same thing both in America and England." R. 111.

The *Napoli* admonition should not be so lightly dismissed. This Court in *The Napoli* followed the English decisions even to the extent of holding that sailing in a wartime convoy in darkness and without lights did not constitute a warlike operation. Mr. Justice Holmes cited and followed the decisions of the House of Lords in *British Steamship Co. Ltd.*, v. *The King (The Petersham)*, [1921] 1 A. C. 99 and *Green* v. *British India Steam Navigation Co. Ltd. (The Matiana)*, [1921] 1 A. C. 104. *The Petersham* was a collision. *The Matiana* was a stranding. While there is much to be said for the point that the sailing in wartime of two convoys in utter darkness with lights doused were of the very nature and substance of warlike operation, and that the meeting of the two convoys head on and the resulting collision between *The Napoli* and *The Lamington* were consequences of such warlike operation, this Court nevertheless accepted the English rule and applied the authorities mentioned. There was nothing of "business expediency" in the decision of this Court in *The Napoli*. It was a rule of law, and should have been so accepted by the Court below as it was in *General Ins. Co.* v. *Link, et al.* (*The Eastern Prince-USS Roustabout*), (9 Cir. 1949) 173 F. 2d 955.

In order to carry through its erroneous theory, the Court below attempted to avoid the *Napoli* admonition because the English authorities cited to the Court call for an unavoidable conclusion that the present collision was a consequence of the warlike operation of the *YMS-12*. The basis assigned by the Court below for avoidance of the *Napoli* admonition is palpably unsound. The admonition was not based on "business expediency", and the fact that British underwriters have seen fit to broaden their cover

beyond the limits fixed by the English decisions, and thus increase their premium revenues, has nothing to do with the legal construction of the insurance contract in effect at the time of this collision.

(b) *The decision of the Ninth Circuit Court of Appeals in The Eastern Prince-USS Roustabout.*

Before the decision of the Court of Appeals below, there was only one decision in the American courts on the question whether, under the form of insurance here found, a collision between a merchant vessel and a vessel engaged on a warlike operation was a consequence of that warlike operation. That decision was *General Ins. Co. of America* v. *Link, et al. (The Eastern Prince-USS Roustabout)*, (9 Cir. 1949) 173 F. 2d 955.

In that case a collision occurred in May, 1942 between the *Eastern Prince*, a merchant vessel, and *USS Roustabout*, a United States Navy tanker in charge of Navy personnel, the latter carrying miscellaneous military cargo from a Navy Section Base in Sitka, Alaska to a Naval Station at Seattle by way of the Inside Passage. Both vessels were held at fault, the former for obscuring her running lights by deck cargo, the latter for navigating on the wrong side of the inside passage. The suit was for damage sustained by the *Eastern Prince*, and was based on war risk insurance provisions similar to those found here. Recovery was allowed.

In the absence of direct decision by this Court on the question presented, the Court followed the admonition of this Court in *The Napoli, supra*, and on authority of the decisions of the House of Lords in *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)*, [1929] A. C. 534 and *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)*, [1923] A. C. 292, held that the collision

was a consequence of the warlike operation of *USS Roustabout*, the Navy tanker, notwithstanding that both vessels were guilty of negligent navigation. That decision is squarely in point.

The United States Court of Appeals for the Second Circuit refused to follow the decision in the Ninth Circuit in *The Eastern Prince-USS Roustabout*, *supra* and, in disregard of the admonition of this Court in *The Napoli*, *supra*, the English authorities on which it was based.

(c) *The English Authorities*

In *Attorney-General* v. *Adelaide Steamship Co. Ltd.*, *(The Warilda)* [1923] A. C. 292, a collision occurred between *The Warilda*, a hospital ship evacuating wounded troops from France and thus held to be engaged on a warlike operation, and *The Petingaudet*, a merchant ship which was displaying dimmed side lights. The vessels sighted each other at a distance of about half a mile [C. A. 1923] 1 K. B. 59, 62. The vessels were found to have met in a crossing situation with *The Warilda* the burdened vessel. She failed to keep out of the way and was held guilty of negligent navigation. The House of Lords held that the dominant and effective cause of the collision was the warlike operation of *The Warilda*. The House of Lords said, [1923] A. C. at page 298 (italics ours):

> "The second point was put on behalf of the appellant in this way. It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the collision, and that the collision was a consequence of that negligence and not of the warlike operation. The Court of Appeal unanimously rejected this argument, and held the

Crown responsible. My Lords, I agree with the view taken by the Court of Appeal. By the terms of the charterparty, the Crown is liable for 'all consequences' of hostilities or warlike operations, nothing being said about their being skilfully or unskilfully conducted. The navigation of the *Warilda* in those waters at full speed without lights was clearly a warlike operation, which in itself involved peril to other ships. The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. *The negligence of the master may have contributed to the loss; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches.* * * *"*

and at page 300;

"* * * And, in short, it appears to me that when a ship requisitioned by the naval authorities and actually engaged in what I have explained to be a warlike operation comes into collision with another vessel under, of course, the exceptional conditions of speed, with lights doused and other such warlike precautions, the category of war risk cannot be changed into the category of sea risk by reason of the negligence of those engaged in conducting those operations. The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. *Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations.*"

In *The Roanoke-The Trevanion, Board of Trade* v. *Main S. S. Co. Ltd.*, [1929] A. C. 534, the House of Lords followed the same principle in a collision, *after the 1918 Armistice*, between the British merchant ship *Trevanion* and the United States Navy Mine Planter *Roanoke*, carrying a quantity of mines.

Both vessels were found to be guilty of negligent navigation by reason of negligent lookout. *The Trevanion*, as the burdened vessel in a crossing situation, failed to give way, and the *Roanoke* failed to keep her course. It was held that the collision was a consequence of the warlike operation of the *Roanoke*, notwithstanding negligence of both vessels.*

In *The Coxwold* (*Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport*), [1942] A. C. 691, the House of Lords applied the same principles to a case of stranding of a vessel engaged on a warlike operation. In that case Lord Porter set down a summary of English law on the whole subject, of which Items 8 and 9 apply directly to the case at bar. The Court below treated that decision as holding that "* * * the dominant and effective cause which set the vessel on the rocks was a deviation of course it had made under naval orders to avoid submarine attack. * * *" R. 107. The change of course to avoid what was thought to be an enemy submarine was stated in the opinions of the Lord Chancellor

* The result was the same in collisions between merchantmen and vessels engaged on warlike operations where there was no fault on the part of either vessel. The collision is the consequence of the warlike operation. *British and Foreign Steamship Company, Ltd.* v. *The King* (*St. Oswald-Suffren*), (1918) 2 K. B. 879; *Attorney-General* v. *Ard Coasters, Ltd.* (*Ardgantock-Tartar*) (1921) 2 A. C. 141; *Liverpool & London War Risks Insurance Association Ltd* v. *Marine Underwriters of S.S. Richard de Larrinaga* (*Richard de Larrinaga-Devonshire*), (1921) 2 A. C. 141; *Charente Steamship Company* v. *Director of Transports*, (*Instructor-America*), (1922) 10 Ll. L. L. R. 514; *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service*, (*Geelong-Bonvilston*), (1923) A. C. 191.

and Lord MacMillan, but the other judges paid little attention to it. The dominant and effective cause of the stranding was held by the majority to be the warlike operation of the vessel, being engaged on a voyage from a British war base to a war base in Norway carrying munitions of war.

A variation is found in a case where the vessel engaged on a warlike operation is not *active* in the collision. In *Clan Line Steamers Ltd.* v. *Board of Trade (The Clan Matheson-The Western Front)*, [1929] A. C. 514 the *Clan Matheson* and the *Western Front* were steaming in adjacent columns in a convoy. The *Clan Matheson* was a merchant ship carrying mostly civilian cargo. The cargo of the *Western Front* was entirely made up of munitions of war, being carried from the United States to a war base in France. At night, in a rough sea, the convoy sailing without lights but with good visibility in moonlight and every vessel in the convoy easily seen, the steering gear of the *Clan Matheson* went out of order and the vessel sheered to left across the bows of the *Western Front*. The *Western Front* struck the *Clan Matheson* and the latter sank within two hours. It was contended that the case was governed, among other authorities, by *The Warilda, supra,* but the Court held that the collision was due solely to the breakdown of the steering gear of the *Clan Matheson,* a merchant vessel; that from the moment the breakdown occurred, the collision was inevitable, and that the collision was the consequence of that breakdown alone. At [1929] A. C. pp. 527-8, Viscount Sumner wrote as follows:

> "* * * It appears to me that on the facts found the collision had become inevitable for a material, if not a measurable, time, before the impact occurred, and, if so, the character of the other vessel, as well as the direction of her course and of the blow, fail to become material. The *Clan Matheson* had become irretriev-

ably a loss by a marine peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship."

It is thus clear that the *Western Front* engaged on a warlike operation no more contributed to the sinking of the *Clan Matheson* than if she had been a rock or any other obstacle in the way of the sheer of the *Clan Matheson*. The *Western Front* was not an active agent in the collision. This distinction was sharply pointed up later in *The Priam*, [1948] A. C. 243.

In *The Priam, Ocean Steamship Co. Ltd.* v. *Liverpool & London War Risk Ins. Assn. Ltd.*, [1948] A. C. 243, the House of Lords dealt with a case in which there was neither a collision nor a stranding but one in which there was damage to cargo by seawater during heavy weather, the vessel being engaged on a voyage which constituted a warlike operation. Some of the damage was attributable to armament installed on and military equipment carried on deck, and some of the damage resulted from the carriage of commercial cargo on deck. The House of Lords distinguished between the two kinds of damage, holding the former due to war risk and the latter due to marine risk.

The Priam was a refinement of the general doctrine in its application to a set of facts not theretofore considered, viz., damage to cargo by heavy weather. Indeed, the situation presented in *The Priam* was forecast by Lord Wright in his opinion in *The Coxwold* [1942] A. C. at pp. 712-713. In *The Priam* the House of Lords [1948] A. C. at pages 253 and 259 recognized the rule stated in *The Warilda, The Roanoke-The Trevanion* and *The Coxwold*, viz., cases of collision and stranding of vessels engaged on a warlike

operation. Lord Wright said [1948] A. C. page 257: (italics ours)

> "On the main issue, however, it seems to me that *there is a real difference of substance in this context between the ship striking a rock or colliding* and being struck by a sea. It is true that it is while she is pursuing the contemplated warlike operation that the sea strikes her and that her striking the rock or colliding is as little purposed as her being struck by a heavy sea. But in the former case she is an *active agent* quoad striking the ship or rock, in the latter she is merely passive. I think that this is a sufficient distinction on the authorities for this purpose. * * *"

And at page 259: (italics ours)

> "Outside of the particular concept of the 'warlike operation' or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, *except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' ship, being actively directed into the obstacle on her warlike course:* for other cases a purely marine loss due to heavy weather must still be held to be the liability of the marine underwriters. * * *"

And Lord Porter said at page 268 (italics ours):

> "* * * As Lord Wright pointed out in *The Coxwold* [1942] A. C. 691, 713: 'the basis of the decisions seems to be that the casualty can be traced to *definite action* on the part of those on board the warship or quasi-warship . . . in directing the course of the vessel to carry out the warlike operation.' That direction may take her into collision with another vessel or on to a rock, but incidents may occur in the course of the voyages without being caused

by such definite action on the part of those directing it. In the case of stranding or collision the progress of the ship brings her on to the rock or into the other vessel. The rock does not move; it is static. If the other vessel runs into her and *it is that vessel's action which causes the injury, it is the progress of that ship and not that of the damaged vessel which causes the injury,* and whether that injury is a war or marine loss depends upon whether the other ship, not the damaged vessel, is engaged upon a warlike operation or upon an ordinary mercantile adventure. * * *"

The above quotations from *The Priam* reflect the true basis for the decision in *The Clan Matheson-The Western Front, supra, viz.,* that the *Clan Matheson,* the merchant vessel, sheered across the bows of the *Western Front.* Thus the entire causation was on the part of the merchant vessel. In the case at bar it cannot be said that either vessel ran into the other. The collision was due to negligent navigation of both "under the circumstances." *Fifth Finding of Fact,* R. 80. See *The Roanoke-The Trevanion,* [1929] A. C. 534.

The principle is therefore clear, under the English cases above cited, that when a vessel is in motion through the water on a warlike operation, she is a moving instrument of war, and damage actively done by her while so engaged, to another vessel, or to herself, in collision or stranding is a consequence of her warlike operation. It makes no difference that negligence of those in charge of a vessel so engaged, or of both vessels in a collision involving a vessel so engaged, may have contributed to the loss. The war risk underwriter of either vessel cannot escape liability on the ground of such negligence.

These are the authorities which apply to the case at bar under the admonition of this Court in *The Napoli.*

The Court below attempted to classify a number of English decisions on varying facts relating to the distinction between marine risk and war risk for insurance purposes, R. 105-108. Such a study might be profitable if one were prepared to accept the inevitable result. But the analysis made by the Court below lost all point when it came to a consideration of the only two decisions of the House of Lords which were on facts similar to the present case. Those decisions are *Attorney-General* v. *Adelaide Steamship Co. Ltd. (The Warilda)* [1923] A. C. 292 and *Board of Trade* v. *Hain S. S. Co. Ltd. (The Roanoke-The Trevanion)* [1929] A. C. 534, on which the *Eastern Prince-USS Roustabout* decision was based. Both were collision cases with fault on the part of the vessel engaged in a warlike operation.

When the Court below, at the end of its analysis of the English authorities finally reached those two decisions directly in point here, it said:

> "If *The Warilda* and *Roanoke-Trevanion* cases really carry British law thus far, we are necessarily compelled to refuse to follow them * * *" R. 108.

It is quite apparent that the extended analysis of the English authorities was undertaken by the Court below in order to rationalize the causation theory on which it based its decision. It even attached considerable weight to the tentative doubts of Lord Wrenbury, as expressed in *The Petersham* and *The Matiana*, R. 112. That dictum of Lord Wrenbury was later ignored by the House of Lords in *The Warilda* and *The Roanoke-The Trevanion*, above cited. Indeed Lord Wrenbury seemed to have changed his mind because he was a member of the unanimous Court in the *Warilda* decision.

(d) *The Rule of Proximate Cause*

The Court of Appeals below recognized that the English courts are as much concerned with proximate cause as

American courts, R. 112, and that the rules set forth in the House of Lords are probably not as much at variance with our rules as has been claimed.

The insurance rule of *causa proxima*, or as it was put in *The Napoli*, "the cause nearest to the loss", prevails both in England and in this country. The phrase "the cause nearest to the loss" was one of many forms of expression used by judges to describe the same thing. See *British & Foreign Steamship Co. Ltd.* v. *The King (St. Oswald-Suffren)*, (1918) 2 K. B. 879 at pages 890-891, where Lord Justice Duke collected the various expressions in order to clarify the essential meaning. But it does not follow that the cause nearest to the loss is the one nearest as to place, or nearest in point of time. Compare the decision of this Court by Mr. Justice Holmes in the following year in *Standard Oil Company of New Jersey* v. *United States (The Llama)*, (1925) 267 U. S. 76, where a stranding was held to be due to war risk under Government policies covering "takings at sea", it being found that at the time of loss the vessel had passed out of her owner's control by seizure within the policy and was under the paramount control and possession of the British Cruiser *Virginia*. This Court did not inquire into whether or not the stranding was due to negligence. The *Virginia's* boarding party went on board the *Llama* on October 29, 1915. She was on her way into Kirkwall when she was lost on October 31, 1915. It was held that the loss was due to the seizure as a war risk, not to the stranding as a marine risk.

See also *Insurance Company* v. *Boon* (1877), 95 U. S. 117 at page 133:

> "The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. * * *"

In *Lanasa Fruit, etc. Co.* v. *Universal Insurance Co. (Smaragd)*, (1938) 302 U. S. 556, this Court showed by their treatment of causation that "proximate cause" in insurance cases must be understood to mean the "dominant and effective cause" or "the real efficient cause", rather than the event nearest to the loss in point of time or place. In the *Smaragd* case the question was whether damage to a cargo of bananas which became overripe and rotted during a delay resulting from stranding, was within the insurance against peril of the sea. At page 562 the Court said (italics ours):

> "The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, *the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. Insurance Company* v. *Boon*, 95 U. S. 117, 130; *Arnould on Insurance*, 11th ed., Sec. 783."

In the *Lanasa* case Mr. Chief Justice Hughes thereupon examined *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, (The Ikaria)*, [1918] A. C. 350 and accepted the principles of causation there stated. This Court reversed the Circuit Court of Appeals for the Fourth Circuit which had done in effect what was done by the Court of Appeals below, i.e., it applied literally the words of the *Napoli* case, "the cause nearest to the loss." The Chief Justice concluded at page 572 (italics ours):

> "* * * The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, *meaning the real*

> *efficient cause of the loss,* requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy."

The tort causation theory that "negligence is the intervening cause" advanced by the Government, and apparently accepted by the Court of Appeals below is not applicable here. The same notion is found in the subsequent decision in *Libby, McNeil & Libby etc.* v. *United States (The David W. Branch),* (Ct. Cl. 1950) 87 F. Supp. 866. That theory was put forward, and flatly rejected, in *The Warilda,* twenty-seven years ago.

The error lies in failure to perceive that this is not a tort question of liability for negligence. It is a matter of insurance of a specified risk.

In *The Warilda,* Lord Sumner said [1923] A. C. at pages 305-6:

> "• • • I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified."

In *The Warilda,* Lord Shaw of Dunfermline said [1923] A. C. at page 300:

> "• • • Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category

of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations."

The citation of Corpus Juris Secundum at R. 110 shows the misconception of the whole point. It begs the question to cite the well established rule that war risk insurance does not cover *marine risks aggravated by war*, but which nevertheless remain marine. Here it is conceded that the *YMS-12 was engaged on the warlike operation of mine sweeping*, and the issue is whether the collision was a consequence of that warlike operation even though contributed to by negligence.

It is settled in this country that insurance against a specified peril is not affected by the cooperation or contribution of another cause, or of negligence contributory to the loss. *The Patapsco Insurance Co.* v. *Coulter*, (1830) 3 Pet. 222, 237; *Columbia Insurance Co.* v. *Lawrence*, (1836) 10 Pet. 509; *Waters* v. *The Merchants' Louisville Ins. Co.*, (1837) 11 Pet. 218, 221; *General Ins. Co.* v. *Sherwood*, (1852) 14 How. 361, 365; *Insurance Company* v. *Transportation Co.*, (1870) 12 Wall. 194; *Orient Insurance Co.* v. *Adams*, (1887) 123 U. S. 67, 72-73. See also *Arnould on Marine Insurance* (13th Ed.) Vol. II, Secs. 798-799, pages 718-720.

The rule is the same in England. *Board of Trade* v. *Hain S. S. Co. Ltd.* [1929] A. C. 534, 539, 544; *Attorney General* v. *Adelaide S. S. Co. Ltd.*, [1923] A. C. 292, 298, 300, 307-308; *Yorkshire Dale S. S. Co. Ltd.* v. *Minister of War Transport*, [1942] A. C. 691, 711; *Trinder, Anderson & Co.* v. *Thames and Mersey Mar. Ins. Co. etc.* (C. A.) [1898] 2 Q. B. 114, 123-124.

(e) *The American Decisions*

The decision of this Court in *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)*, (1924) 263 U. S. 487, was an important decision on the general subject, but it did not decide the question here involved. While the war risk insurance in that case contained provisions treated as equivalent to "all consequences of hostilities or warlike operations" neither vessel in that collision was found to have been engaged on a warlike operation. The decision was, in effect, that the collision between the *Napoli* and the *Lamington* was due to marine risk, not because it was due to negligence but because neither of the merchant vessels involved were engaged on a warlike operation. The Court below recognized that point. R. 105.

The point of negligence received considerable attention in the District Court and in the Circuit Court of Appeals for the Second Circuit; but it was passed over in this Court. Mr. Justice Holmes said:

> "* * * As our judgment is based on broader grounds, we do not describe the movements bearing upon the nice question whether the navigation of the *Napoli* or the *Lamington* was in fault."

There is not any conflict between the English decisions above discussed and the recent American decisions in the lower Courts.* None of those American cases mentioned in the decision below, R. 105, 109, 110, involved a collision in which one of the vessels was engaged in a warlike operation; and in the only stranding case cited, *Standard Oil*

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* *Reinold* v. *United States*, (2 Cir. 1948) 167 F. 2d 556, Cer. den. 335 U. S. 824; *Crist* v. *United States War Shipping Administration*, (3 Cir. 1947) 163 F 2d 145, Cer. den. 332 U. S. 852; *Dennehy* v. *United States*, (SDNY 1926) 15 F. 2d 196; *Standard Oil Company of New Jersey* v. *St. Paul Fire & Marine Ins. Co.*, (SDNY 1945) 59 F. Supp. 470; *Nordling* v. *Gibbon*, (SDNY 1945) 62 F. Supp. 932.

Company of New Jersey v. *St. Paul Fire & Marine Ins. Co.*, (SDNY, 1945) 59 F. Supp. 470, the vessel was on a commercial voyage.

The main point of the Government's case in the Courts below, and of the opinion of the Court of Appeals below, is that the English rule "would conflict hopelessly with a long line of American decisions", R. 108. That line of decisions as cited in the opinion, R. 109 begins with *Morgan* v. *United States*, (1871) 14 Wall. 531, and ends with *New Orleans-Belize, Royal Mail and Central American Steamship Co. Ltd.* v. *United States*, (1915) 239 U. S. 202, R. 109.

In setting up those cases as an obstacle to the application of the English rule, the Court below refused to recognize the exact nature of the war risk insurance involved in those cases, although it was fully discussed in brief and argument. R. 104 footnote.

The Civil War charters and later Government charters involved in those cases, with one exception immaterial here, provided only that the Government assumed the "war risk". The exception was the charter in *Leary* v. *United States*, (1877) 81 U. S. 607, in which the Government assumed "extraordinary marine risk". In all those cases the loss was held due to marine risk, and in *Leary* v. *United States* the loss was held not due to extraordinary marine risk.

The term "war risk" used in those charter provisions had the limited meaning of *acts of the public enemy or the casualties of war*. As none of those cases involved any act of the public enemy nor any casualty of war the Government was absolved from liability because it had assumed only "war risk".

The meaning of the term "war risk" was laid down in the decision of the Court of Claims in *Morgan* v. *United States*, (1869) 5 Ct. Cl. 182. There the vessel, carrying

troops and military stores, was ordered by military authority to sail from port, against the judgment of her master because of low water on the bar. She was damaged by striking the bar. At pp. 189-190, the Court said: (italics ours)

> "1st. We are to inquire whether the damage to this vessel was the result of a 'war risk' assumed in the charter-party by the United States. The term 'war risk' is an unusual one. I do not find it in the works on insurance or adjudged cases. In the case of *Bogert* v. *The United States*, (2 C. Cls. R., 159) this court held that the terms in a policy in which the United States were the insurers could not be extended beyond the 'acts of the public enemy' or 'the casualties of war'; and that by its use the United States did not insure against their own acts. In that case the vessel was in the service under a valued charter-party, and containing the accruing clauses, with the right to purchase at the specified valuation. During the period of the vessel's service, to guard against the approach, or defeat the operations of the enemy, General Butler caused the vessel to be sunk in the James River, and it was held that this was not embraced within the meaning of a war risk, as used in the charter-party; that such an undertaking by the government is not an insurance against its own acts, although it destroyed the vessel for a war purpose. *To bring it within such a war risk as is assumed in this contract, the damage must have resulted directly, or proximately at least, from some act or operations of the public enemy.* Nothing of the kind exists here, and no obligation rests upon the United States growing out of that clause in the charter-party."

See also *Bogert* v. *The United States*, (1866) 2 Ct. Cl. 159, where the vessel was deliberately sunk in the James

River by General Butler's orders as noted in *Morgan* v. *United States* above quoted. The loss was not due to an act of the public enemy, nor was it found to be a "casualty of war". The Court said at p. 163 (italics ours):

> "* * * I do not find that this general term 'war risk' has ever been employed in a policy of insurance, or, if so employed, that it has ever received a judicial interpretation. As employed in this contract, *we think that it cannot be extended so as to mean more than 'acts of the public enemy'; or, at the utmost, the casualties of war;* and we think that it was never intended that the government should be placed on the same footing with the public enemy, or become an insurer against its own acts."

Compare *Baker* v. *United States,* (1867) 3 Ct. Cl. 76, where the vessel was stranded and lost by capture because the enemy gun fire of a Confederate shore battery shot away her anchor chain. The resulting stranding and loss, in sharp distinction to the other Civil War decisions cited by the Court below, was held due to "war risk".

Thus the limits of the term "war risk" as found in those charters were clearly established. The losses in the *Morgan* and *Bogert* cases which clearly would be covered by the present war risk insurance as "consequences of hostilities or warlike operations" were held not covered by the narrow term "war risk" because there was no direct act of the public enemy and no direct casualty of war. Indeed, this Court on appeal in *Morgan* v. *The United States* (1871) 14 Wall. 531 observed that in obedience to the rule of proximate cause, it could not "proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel". Under the present insurance clause this Court would have made such an inquiry because the vessel, carrying troops

and munitions, was forced to sail against the judgment of her own Master and under direct compulsion of the orders of the military authority.

The meaning and scope of the term "war risk" as found in the early American cases is thus altogether clear. The later provision "consequences of hostilities or warlike operations" was not then, as it is now only by virtue of the present form of F. C. & S. Clause, and by statutory definition, *infra*, page 40, included among the risks covered by war risk insurance. Its history shows that it was devised to provide insurance for losses *in the nature of marine risk, but which are consequences of war though not directly due to enemy acts.*

In the footnote at R. 104, the Court of Appeals below stated that—

> "* * * the parties here showed a different view in their twenty-two clauses defining a war risk—insurance for this being the form of insurance required of the Government under its charter obligation—and demonstrating that 'consequence of hostilities' was only one component of many, of war risk; and we see nothing in the earlier cases or here to indicate that this conception is other than the natural and usually understood one."

The "twenty-two clauses" referred to are apparently the categories of the F. C. & S. Clause, which appears in full in the Tenth Finding of Fact. R. 82. It is immaterial whether or not the count of the categories is correct. The point is that the Court of Appeals below said that an F. C. & S. clause which defines various categories of risk to be excluded from a form of marine hull policy promulgated by the Government in 1942, defines the meaning of the term "war risk" as used in the Government charters in the Civil

War. Even if that proposition were not dubious on its face, it is deprived of all substance by the definition assigned to that term by the Court of Claims in *Morgan* v. *United States*, (1869) 5 Ct. Cl. 182, 189-190, Affirmed (1871) 14 Wall. 531, and *Bogert* v. *United States* (1866) 2 Ct. Cl. 159.

When the Court of Appeals below said, in its footnote on R. 104, that it saw nothing in the earlier cases to indicate that "this conception is other than the natural and usually understood one", it disregarded the plain interpretation and limitation of the meaning of the term "war risk" in the early cases, as stated by the Courts which decided those cases. It also ignored the history of the development of the present phrase "consequences of hostilities or warlike operations" which is now specially provided in what is commonly called "war risk insurance."

The history of the development of the phrase "all consequences of hostilities or warlike operations" was described by Lord Atkin in *Britain S. S. Co. Ltd.* v. *The King (The Petersham)*, [1919] 2 K.B. at pp. 692-693. Its development apparently began with the term "consequences of hostilities" as found in *Ionides* v. *The Universal Marine Ins. Co.*, (1863) 14 C. B. (N. S.) 259. The provision was later broadened in 1883 to include "warlike operation". See also *Arnould on Marine Insurance*, 13th Edition, Volume I, Sec. 10, pp. 14-21, and Volume II, Secs. 905a-905i, pp. 822-835. It appears that it was not until 1898 that Lloyds published an F. C. & S. clause containing the present provision. However, not all war risk insurance written thereafter contained it. Compare *Muller* v. *Globe and Rutgers Fire Ins. Co. (The Canadia)*, (2 Cir. 1917) 246 Fed. 759 with *Standard Oil Company of New Jersey* v. *United States (The Llama)*, (1925) 267 U. S. 76. So far as we have found, the earliest reported collision case in which the present clause was considered was *British and Foreign*

S. S. Co. Ltd. v. *The King (The St. Oswald-The Suffern)*, [1917] 2 K. B. 769, [1918] 2 K. B. 879 where the loss of the *St. Oswald* was held to be the proximate, direct and immediate consequence of the warlike operation of the French Battleship *Suffern*.

In the recent decision in *Yorkshire Dale S. S. Co. Ltd.* v. *Minister of War Transport (The Coxwold)*, [1942] A. C. 691, at page 697, the Lord Chancellor said (italics ours):

> "Before referring to other decisions of this House which bind us, I would call attention to the exact question raised by the terms of the charterparty in the present case. *The relevant contrast is not, strictly speaking, between marine risks and war risks.* The *Coxwold* accidentally stranded, that is to say, she was proceeding through the sea when the water under her bottom became too shallow to keep her afloat, and she consequently ran aground. No misfortune could be more marine in its nature than this, but *the question here is not whether this is a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as 'the consequence of warlike operations'.*"

To the same effect, Lord Wright in the same case, [1942] A. C. at p. 707.

In the recent Merchant Marine Act Amendment, Public Law 763, 81st Congress, 2nd Session, approved September 8, 1950, enacting war risk insurance provisions in connection with the present emergency, Congress took pains to define the term "war risks", as used in that Act, as follows:

> "(c) The term 'war risks' includes to such extent as the Secretary may determine all or any part of those losses which are excluded from marine insurance coverage under a 'free of capture and seizure' clause, or analogous clauses."

If the views expressed by the Court of Appeals below in the footnote at R. 104 were correct, no such definition would have been necessary. It was clear to Congress even at that late date, that the term "war risks" as used in the Act mentioned, required explicit definition in order to cover all the risks customarily excluded from marine insurance by an F. C. & S. Clause.

There is no foundation, therefore, for the statement of the Court below, R. 108, that the English rule would conflict with American decisions.

(f) *The Opinion of the Court of Appeals Below*

The Court of Appeals below by a complex course of reasoning reached the conclusion that the decision of the District Court should be reversed. The result is clear enough, but the precise ground for it is difficult to find, if it can be found at all.

We know from the Government's appeal brief below that its principal point was that the negligence of both vessels constituted the proximate cause of the collision. Compare the subsequent decision of *Libby, McNeil & Libby, etc.*, v. *The United States (The David W. Branch)*, (Ct. Cl. 1950) 87 F. Supp. 866, where that view, erroneous as has been shown, is clearly stated.

After a prolonged discussion of the English cases, and of the American cases, and after stating its reasons for disregarding the *Napoli* admonition, when the Court of Appeals below came to the point where it could be expected to state in precise terms the ground for decision, the Court stated, R. 112-113, that the result is "tolerably clear", recognized the concession that the *YMS-12* was engaged in a warlike operation at the time of the collision, correctly stated the question to be decided, and then instead of decid-

ing it, erroneously cited the *Meseck* case for something it did not hold. The Court then held that the stipulated facts failed to sustain the petitioner's burden of proof, but did not say why, except in so far as it might be suggested that the Court intended to hold, by its misconstruction of article 5 of the stipulation of facts (in disregard of the plain meaning of the language used) that ordinary navigating negligence was the proximate cause of the collision. R. 113.

If that is the ground of the decision below then it runs squarely against the established principles of basic insurance law in America and in England. And it should be noted that in *The Warilda* and *The Roanoke-The Trevanion*, the negligence was ordinary navigating negligence. Likewise, in *The Eastern Prince-USS Roustabout*.

We have already shown that Lord Wrenbury, to whose dictum in the *Petersham, supra*, the Court below attached considerable importance, R. 112, had resolved his own doubts by the time he wrote his concurring opinion in *The Warilda*, [1923] A. C. at pp. 307-309, about two years after his dictum in *The Petersham*. In the course of his *Warilda* opinion Lord Wrenbury made the following observations on the lack of effect of negligence in the insurance of a loss:

> "In *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* [1898] 2 Q. B. 114, it was decided that in the case of a policy of marine insurance, loss by stranding occasioned by the negligent navigation of the master was a loss in respect of which the underwriters were liable. The principle is that the underwriter insures against a loss occasioned by a peril of the sea, and that stranding is none the less a peril of the sea though brought about by negligent navigation. The negligence does not alter the character of the sea peril, which still remains the *causa proxima*. So if I insure my house against fire, or my carriage or car against road risks, the risk

that my servant may negligently set the house on fire, or that my driver may drive negligently and cause a collision, is exactly one of the risks against which I sought insurance. I insured against fire or collision. The fire or collision occurred and the insurance office is to bear that risk to my indemnity. The fire or the collision is the *causa proxima* of the loss—the negligence is a cause more remote. As regards sea peril, I may perhaps express it by saying that the underwriter insures against the sea peril, however it may happen—including, therefore, negligence of the master. It is otherwise if the loss occurs through the wilful negligence or wilful act of the assured. In that case the loss does not 'happen', but is caused by the assured himself, and, consequently, he cannot recover.

"Collision is a sea risk and art. 18 of the charter party holds the Admiralty not liable in the case of collision 'or any other cause arising as a sea risk'. But art. 19 renders it liable for 'all consequences of hostilities or warlike operations'. The question, therefore, is as between sea risk and war risk; was this loss a consequence of the warlike operation in which the vessel was engaged? Does the fact that the master was negligent render the loss one which was not a consequence of that warlike operation? In my judgment it does not. The principle of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*: [1898] 2 Q. B. 114 applies. The operation in progress was the navigation of the ship; that operation was a warlike operation, and none the less because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter the character of the operation, and the loss was a consequence of

> the warlike operation, which still remained the *causa proxima.*"

In treating the English authorities the Court below repeatedly emphasized the element of "sailing without lights" as though it were an element of a warlike operation. Such a circumstance, along with sailing in convoy, was held by the House of Lords not to constitute an element of warlike operation. *The Petersham* and *The Matiana*, [1921] A. C. 99. It was so held by this Court in *The Napoli*, *supra*. See also *Nordling* v. *Gibbon* (SDNY, 1945) 62 F. Supp. 932.

The Court below then interprets the English rule as requiring "both of the necessary elements". R. 106.

The difficulty with that statement is that it strives to inject a question of fact into what the English cases have held to be a matter of law. It is the uniform English rule that if the vessel is engaged in a warlike operation, and if she was an active agent in a collision or stranding, it follows that the movement of the vessel through the water on the warlike operation *is* "the dominant and effective cause of the resulting catastrophe", thus fulfilling the condition correctly stated by the Court of Appeals below at R. 105 as follows:

> "* * * To put it another way, not only must the vessel's mission be one of war, but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe."

The Court's emphasis on "sailing without lights" was in order to explain away the decisions which do not agree with its theory of causation. See the treatment of the English cases, *The Ardgantock*, [1921] 2 A. C. 141; *The Richard de Larrinaga*, [1921] 2 A. C. 141; *The Geelong*, [1923] A. C. 191. R. 106-107. Such a narrow view of the English authorities is erroneous in view of the decisions in *The Petersham*

and *The Matiana,* [1921] 1 A. C. 99 and the decision of this Court in *The Napoli, supra.*

In short, it is apparent that the Court below wished to interpret the English decisions, which hold that a collision or stranding is a consequence of a warlike operation, as being in part based on the fact that the vessel was sailing without lights (the present vessels carried proper lights), rather than the rule of law that the collision or stranding was the legal consequence of the warlike operation of the vessel so engaged.

In order to clear the way for its erroneous theory and conclusion, the Court of Appeals below was forced into misinterpretation of the record and authorities, which we summarize as follows:

(1) It stated in the first paragraph of the opinion that the collision was *due* to the faulty navigation of both vessels, R. 103; and later misconstrued Article 5 of the Stipulation of Facts herein, R. 80, in holding that the parties had agreed that *the cause* of this collision was the negligence on the part of both vessels, R. 113, in complete disregard of the fact that Article 5 of the Stipulation of Facts said only that the aforesaid collision "*was contributed to*" by the mutual fault therein described.

(2) It held that the negligence found below pursuant to said stipulation was ordinary negligence in navigation rather than as found by the District Court, negligence "under the circumstances" of the special and extraordinary conditions created by the warlike operation of mine sweeping, *Opinion*, R. 90, and, as set forth in the preceding articles of the stipulation.

(3) It repeatedly treated the war risk insurance clause "consequences of hostilities or warlike operations" as only "consequences of hostilities", with-

out reference to the additional words "or warlike operations", thus seeming to attempt to avoid or minimize the effect of the concession and finding below that the *YMS-12* was at the time of the collision actually engaged on the warlike operation of sweeping for enemy mines. R. 104, 105, 107, 108, 112, 113.

(4) It stated that the District Court decision in *Meseck Towing Lines, Inc. v. Excess Ins. Co. Ltd.*, (E.D.N.Y. 1948), 77 F. Supp. 790 was "On facts almost identical to those involved here * * *", R. 113, in order to make a show of authority for its erroneous theory. In the *Meseck* case the District Court found that the collision was not the consequence of a warlike operation, because it found as a fact that the submarine chaser was on relief from her station at sea to return to port for fuel, and was not engaged on a warlike operation at the time of the collision with the tug.* Here it was conceded and found by both courts below that the *YMS-12 was* actually engaged in the warlike operation of mine sweeping at the time of the collision.

(5) It treated petitioner's case as though founded on the absurd contention that war risk insurance is all-inclusive and covers all risks of whatever nature to a vessel engaged on a warlike operation, and as though the question here were one of marine insurance of ships devoted to missions of war, despite the fact that the case involves the exact reverse, i.e., war risk insurance on the *Worth-*

* The official report of the *Meseck* decision, 77 F. Supp. 790 is incomplete. It sets forth only what the Court included under the heading "Discussion". The findings of fact and conclusions of law, referred to at the end of the opinion, are not contained in the official report. These will be found at 1948 AMC 979-982. The fourth "conclusion of law" was as follows:

"(4) The collision with the *Frederick E. Meseck* in March 1944, inside the Narrows, occurred during one of the periodic relief periods of the SC 1294, before she had resumed her patrol duties, and at the time of collision the SC 1294 was not engaged in a warlike operation."

ington, a merchant vessel *not* devoted to a mission of war. R. 110.

(g) *Hypothetical Concessions by the Court Below*

After all the analyses of the English and American cases, the Court below made the following concessions, R. 112:

> "* * * Under our own authorities the war risk underwriters must be held liable for the loss of a ship which by faulty navigation has left a swept channel and hit a mine. And if a master negligently fails to black out his vessel, and the lights left on it enable a submarine to torpedo it, there would be little hesitation in calling the loss a consequence of hostilities. * * *"

These concessions give rise to further question. If negligence was an intervening cause in the present case, why not in the hypothetical cases put by the Court? Yet by some formula not made clear, the Court below in the hypothetical cases managed to get rid of negligence as a bar to war risk insurance. The Court admitted, as it was bound to do, that in the cases supposed the losses would clearly be covered by war risk insurance. But where is the distinction between the hypothetical cases and the present case? Is it because the loss is caused by an exploding mine or by a torpedo? There is no authority for the proposition that the present war risk insurance covers only losses by enemy mines, torpedoes or projectiles. The phrase "consequences of hostilities or warlike operations" shows by the words "or warlike operations" that the cover extends beyond the consequences of actual hostilities. It has already been shown that the English authorities unite on the view that damage actively done by a vessel moving through the water on a warlike operation is a consequence of that warlike operation. And we submit that it is an inexorable conclusion

that if the hypothetical cases put by the Court below would be covered by the present war risk insurance, then damage actively done by a vessel engaged on a warlike operation either to another vessel or to herself is also covered as the consequence of the warlike operation.

The concessions made by the Court below in the hypothetical cases at R. 112 destroy the basis of the Court's whole decision. For if negligence would be immaterial in the supposed cases of loss by a mine or by torpedo, then negligence is immaterial in any loss where a vessel engaged on a warlike operation is actively directed against another vessel, or an obstruction.

(h) *"Motivation" of the British decisions*

There was a suggestion from Government counsel in the District Court, which has reappeared at page 11 of the brief of the Solicitor-General in opposition to the petition for writ of *certiorari* herein, that the 1923 and 1929 decisions (*The Warilda* and *The Roanoke-The Trevanion*) upon which the petition in these cases placed considerable weight, "were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I". That footless speculation, without a vestige of proof, should not pass unnoticed.

The suggestion apparently is that it was the plan of the House of Lords to protect marine underwriters by casting losses on the war risk underwriters. A review of the decisions not only makes that suggestion ridiculous but the implication is a serious reflection on the integrity of the House of Lords, whose decisions on maritime matters have always received the highest consideration of the American courts.

This Court in *The Napoli* followed the British decisions in *The Petersham* and *The Matiana*, both of which cast the loss upon the marine underwriters. There were many other similar decisions in which the marine underwriters, and not the war risk underwriter, were held liable, among *Adelaide S. S. Co. Ltd.* v. *The Crown (The Second Warilda)* [1926], A. C. 172 which will be discussed in our next point, *The Clan Matheson-The Western Front* (1929), A. C. 514, and *The Priam*, [1948] A. C. 243.

It is fairly demonstrable that the House of Lords has been much more concerned with stating a correct and practical rule of law than "shoring up the weakened financial structure of British marine insurance companies."

It is also stated in the same brief at page 10 that the question presented is no longer one of apportioning a risk between two private insurance companies. This obviously was intended as a reason for paying no further attention to the *Napoli* admonition. But examination of the English cases shows that the question was usually one between the marine underwriters on the one hand and The Crown, as war risk underwriter, on the other. The present case likewise is between a private shipowner and the Government.

(i) *Conclusion.*

We therefore submit, under the decisions of the House of Lords in *The Warilda* and *The Roanoke-The Trevanion* and of the United States Court of Appeals for the Ninth Circuit in *General Ins. Co. of America* v. *Link et al.*, (*The Eastern Prince-USS Roustabout*) pursuant to the admonition of this Court in *The Napoli*, that the collision herein was a consequence of the warlike operation of mine sweeping in which the *YMS-12* was then engaged, and thus within the terms of the *Worthington's* war risk insurance which covered "all consequences of hostilities or warlike operations".

SECOND POINT.

PETITIONER'S COLLISION LIABILITY HEREIN IS INSURED BY THE GOVERNMENT WAR RISK INSURANCE.

We respectfully request the Court to deal with this question as it involves only a question of law on the facts and insurance provisions found below.

The District Court held that the collision was a consequence of the warlike operations of the *USMS-12*, and that the terms of the government war risk endorsement insured petitioner against the collision liability. *Opinion*, R. 90-95.

The Court of Appeals below did not deal with this point. It held in effect that the war risk insurance never came into operation at all because the collision was not a "consequence of hostilities or warlike operations". *Opinion*, R. 113.

The war risk endorsement expressly referred to the risks covered by the Collision Clause, as follows:

> "* * * It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty. * * *"
>
> *War Risk Clauses*, Eleventh Finding of Fact, R. 83-84; *Government Ex.* 1-(c), R. 72, in evidence R. 32.

The second paragraph of the F. C. & S. Clause provided that a war risk endorsement if added later would supersede the F. C. & S. Clause to the extent that their terms are inconsistent. The second paragraph of the F. C. & S. Clause was rightly described by the District Court as a "subordi-

nation clause", *Opinion,* R. 94, and we shall so refer to it. It was as follows:

> *"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."*
>
> *Form of Policy,* Government Ex. 1-(c), R. 71, in evidence R. 32; Tenth Finding of Fact, R. 82.

The war risk endorsement, is made the dominant clause by the terms of the subordination clause.

Insofar as it includes the term "(including the Collision Clause)", the war risk endorsement is inconsistent with the F. C. & S. Clause.

The war risk endorsement directs that the risks excluded from the attached marine hull policy form by the F. C. & S. Clause contained therein shall include the risks covered by the Collision Clause. The provision "(including the Collision Clause)" supersedes, and thus must be read into, the F. C. & S. Clause. Being thus carried back into the F. C. & S. Clause by the effect of the subordination clause, it operates to include the risks covered by the Collision Clause among all other risks excluded from the marine hull insurance in any casualty which is a "consequence of hostilities or warlike operations".

The war risk endorsement then takes over and insures all risks so excluded from the marine hull policy, among them those of the Collision Clause.

In dealing with the subordination clause the District Court said:

> "This, in effect is a subordination clause whereby the scope of the 'F. C. & S.' clause must be read as coextensive with the undertaking contained in the war risk endorsement."
>
> . . . . . .
>
> "It appears that the whole purpose of the subordination was to make the exclusion of the 'F.C.&S.' clause commensurate with what was assumed by the war risk endorsement. The result is that the running-down liability for war risk collision is excluded from the marine policy and that the war risk underwriters assume the collision liability so excluded."
>
> **R. 94.**

Accordingly, the District Court properly held that the first paragraph of the F.C.&S. Clause as amended by the war risk endorsement by virtue of the subordination clause, should be deemed amended so as to read as follows:

> "Notwithstanding anything to the contrary contained in the Policy (including the collision clause), this insurance (including the collision clause), is warranted free from any claim for loss, damage, or expense caused by or resulting from . . . all consequences of hostilities or warlike operations . . ."
>
> **R. 94.**

There appears to be only one prior case on the subject of war risk insurance of collision liability, and that is the decision of the House of Lords in *Adelaide Steamship Co. Ltd.* v. *The Crown (the second Warilda)*, [1926] A. C. 172.* There the war risk insurance was accomplished by Clause 19 of the Requisition Charter of *The Warilda*. It may be convenient to set down in parallel form the insurance provisions of the second *Warilda* in contrast to the insurance provisions now before this Court, as follows:

---

* See footnote *ante*, p. 17.

Warilda

[1926] A. C. at pp. 177-178

"19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:

'Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.'"

Worthington

R. 82-83

WAR RISK CLAUSES

* * * It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty. * * *

F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations. * * *.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The distinction between the two forms of war risk contract is apparent from the comparison set forth above. In the present case there was an express reference to the Collision Clause of the marine hull policy form. In the second *Warilda* there was not any such provision.

In the second *Warilda* it was held that notwithstanding the fact that the collision with the *Petingaudet* was a consequence of warlike operations, the collision *liability* of the owner of the *Warilda* arose solely because of negligence; and that as such negligence is covered only by the Collision or "Running-Down" Clause of the policy, and as the Collision Clause of the policy is historically an appendage not originally part of the basic marine policy, *De Vaux* v. *Salvador*, 4 Ad. & E. 420; *Xenos* v. *Fox*, (1868) L. R. 3 C. P. 630, the F. C. & S. Clause did not operate upon it; that the collision liability was therefore not excluded by the F. C. & S. Clause, and accordingly was not taken over by the war risk contract.

The second *Warilda* did not involve any provisions, as here, which carried over to the Crown the burden of the *Warilda's* collision liability.

Because of a wide difference in the form of insurance contract the decision in the second *Warilda* does not govern the present case. The present case should be decided on the terms of its own form of contract.

This Court is now dealing with an entirely different set of provisions which unmistakably cast upon respondent as war risk underwriter the insurance of petitioner's collision liability.

If the words "(including the Collision Clause)" as inserted in the first paragraph of the war risk endorsement, and which are to be deemed included in the F. C. & S. Clause by amendment through the subordination clause, did

not mean that the collision liability risk covered by the Collision Clause was to be among the risks excluded from the marine policy form by the F. C. & S. Clause, then what did they mean? The whole purpose and scope of the Collision Clause is the "running-down" liability with respect to the vessel insured. If these words, inserted in the war risk endorsement in full light of the second *Warilda*, did not mean that the collision liability was to be covered by the war risk endorsement, then this clause, promulgated by the Government, is an absurdity. Such a result should not be accepted by this Court.

There is no ground for argument here, as was held in the second *Warilda*, that the collision liability of petitioner was due only to negligence and thus not within the cover of the war risk insurance, because the present war risk endorsement specifically refers to and insures the risks covered by the Collision Clause which covers loss due to liability. Liability arises only by reason of fault or negligence. Therefore the war risk endorsement, unlike that found in the second *Warilda*, expressly provided for insurance of loss by reason of liability due to negligence.

The insurance clauses here involved are perfectly clear as to meaning and scope. But in its appeal brief below the Government undertook a tortuous explanation of the meaning of the words "(including the Collision Clause)" as found in the war risk endorsement, and may do so here.

The gist of the Government's argument appears to be that the phrase "(including the Collision Clause)" was inserted only to identify a marine form of hull policy containing a Collision Clause. There is no substance to that suggestion because marine hull policies commonly include a Collision Clause; and the war risk endorsement expressly refers to "the attached policy" which in fact contained a

Collision Clause. There was no need for identification of the "attached" policy. Thus the Government would have the Court understand that the words "(including the Collision Clause)" were redundant, purposeless, and had no real meaning at all.

It is unnecessary to add that it is fundamental in insurance law that ambiguity in the forms of policy prepared and issued by the underwriter shall be resolved in favor of the assured.

National Bank v. *Insurance Company,* (1877) 95 U. S. 673, 678-679;
Hagan v. *Scottish Union & Natl. Ins. Co.,* (1902) 186 U. S. 423, 426;
London Assurance Co. v. *Companhia de Moagens do Barreiro,* (1897) 167 U. S. 149, 159;
Mutual Life Ins. Co. of New York v. *Hurni Packing Co.,* (1923) 263 U. S. 167, 174;
Strochmann v. *Mutual Life Ins. Co. of New York,* (1937) 300 U. S. 435, 439-440.

We therefore submit that respondent, under the war risk endorsement, insured petitioner's liability to respondent arising out of the collision between the *Worthington* and the *YMS-12.*

THIRD POINT.

PETITIONER IS ENTITLED TO INDEMNITY WITH RESPECT TO THE COSTS OF DEFENSE OF THE COLLISION LIBEL.

Again we respectfully request the Court to deal with a question not decided by the Court of Appeals below, because it involves only a matter of law on facts found below.

These cases present the unusual situation in which an underwriter has sued its assured on a claim covered by the insurance issued by the underwriter to the assured.

The District Court held that petitioner is entitled to indemnity by reason of the provisions of the war risk insurance already set forth. R. 95.

The Collision Clause of the marine hull policy form, *ante*, page 8, covers the costs of defense of the collision libel.

The war risk endorsement insures risks covered by the Collision Clause in any casualty which is a consequence of hostilities or warlike operations.

It was found below that petitioner notified respondent that it would look to respondent for full indemnity both as to collision liability and as to the costs of defense of respondent's collision libel in No. 27. *Letter*, Ex. A, *Thirteenth Finding of Fact*, R. 84-85; Ex. A, R. 76, in evidence R. 55.

The Government declined liability. *Letter, Fourteenth Finding of Fact*, R. 85-86; Ex. B, R. 77, in evidence R. 55.

When those letters setting forth notice and refusal were offered in evidence, Government counsel said that he thought the exchange of letters a "wholly useless and senseless gesture which has no bearing because we brought the action ourselves." R. 55.

Accepting that view for the time being, it follows that whether a demand was necessary or not, respondent is liable to indemnify petitioner against the costs of defense of the collision libel by reason of the express undertaking in the Collision Clause, as taken over and insured by the war risk endorsement, to pay such costs.

CONCLUSION.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN THESE CASES SHOULD BE REVERSED AND THE DECISION AND DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HEREIN SHOULD BE REINSTATED.

Dated, New York, September 20, 1950.

Respectfully submitted,

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Nos. [illegible] and [illegible]

In the Supreme Court of the United States

OCTOBER TERM, [illegible]1950

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER OF THE STEAM TANKER JOHN WORTHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 663

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 113-136) is reported at 81 F. Supp. 183. The opinion

of the United States Court of Appeals for the Second Circuit (R. 150-162) is reported at 178 F. 2d 488.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 15, 1949 (R. 162). The petition for a writ of certiorari was filed on March 10, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a marine collision resulting from the negligent navigation of both colliding vessels is converted from a marine risk to a war risk, for insurance purposes, solely by reason of the fact that one of the vessels involved was a naval mine sweeper engaged in its work.

CONTRACT PROVISIONS INVOLVED

The Free of Capture and Seizure Clause, delineating war risk insurance coverage, provides (R. 118-119):

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a dec-

laration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The war risk endorsement provides as follows (R. 120, 134, 152):

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

STATEMENT

The district court's findings of fact herein were based on a stipulation of the parties (R. 95-98, 113). The *YMS-12* was a mine sweeper of the United States Navy engaged in sweeping a swept channel in the approaches to New York harbor at the time of the collision (R. 114). The steam tanker *John Worthington*, owned by petitioner (R. 114), was in ballast and outward bound in convoy (R. 115). The weather was clear with good visibility (R. 115) and, as it was at night, both ships were showing their proper running lights (R. 114-115). The ships collided; the *John Worthington* sustained no damage while the *YMS-12* was damaged (R. 115). The district court found (R. 115) that the collision was

> * * * contributed to both by fault in the navigation of SS. John Worthington and fault in the navigation of the United States Ship YMS-12, consisting of failures on the part of both vessels to comply with applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances.

At the time of the collision the *John Worthington* was operating under a time charter party between petitioner and the United States (R. 115). By the terms of the charter party, petitioner was required to provide marine hull as well as protection and indemnity coverage, either by assuming the risks or by insurance (R. 116). Such coverage was not merely for petitioner's benefit as owner but was also to "* * * protect the interests of the Charterer [the United States] to the extent of the liability it would have if it were the owner of the Vessel" (R. 116). The charter party required the United States to provide war risk insurance (R. 116). Petitioner chose to assume, rather than to insure, marine risks.[1] The United States provided war risk insurance by endorsement on a marine hull insurance form, covering those risks excluded from the usual marine hull form by the customary

[1] Pet. 3, fn., criticizes the court below for stating that petitioner had obtained marine coverage (R. 152). This assumption by the court below was possibly derived from the obscure wording of the finding on the point (Finding 12, R. 121).

Free of Capture and Seizure (F. C. & S.) clause (R. 116-120; *supra*, pp. 2-3).

The instant proceeding was instituted by a libel filed by the United States against the *John Worthington* to recover $150,000 on account of the damage sustained by the *YMS-12* (R. 4-8). Petitioner's answer (R. 9-21) raised the defense, *inter alia*, that the collision was covered by the war risk binder and that the United States, as war risk insurer, was liable to it in the event that the *John Worthington* was found to be at fault (R. 20). Petitioner filed a cross libel (R. 28-38) to recover from the United States, under the war risk coverage, the costs and expense incurred in defending the collision suit (R. 37-38). The district court found that, since both vessels were at fault, petitioner was liable to the United States for one half of the collision damages to the *YMS-12* (R. 124). However, the district court found that the collision was "* * * a consequence of the warlike operation of *YMS-12*" (R. 125), and that petitioner's liability to the United States by reason of the collision was covered by the war risk insurance binder (R. 130). Further, the district court held the United States bound to indemnify petitioner, under the war risk insurance, for the cost of defending the collision suit (R. 136). Judgment was entered accordingly (R. 137-138).

On appeal, the district court judgment was reversed (R. 162-163). The court below held that the

loss to the *YMS-12* was due to a normal marine risk; that the United States was entitled to recover half damages from petitioner; and that the war risk insurance was not applicable (R. 161). It was, of course, unnecessary to consider whether the war risk insurance binder covered petitioner's cost of defending the collision suit (R. 161).

ARGUMENT

1. The petition herein, and that in No. 710, *Libby, McNeill & Libby* v. *United States*, seek to have this Court re-examine and change the well established principle employed in differentiating between marine and war risk insurance coverage in particular factual situations.[2] Here, the collision was caused, as found by both courts below, by negligent navigation on the part of both vessels (R. 115, 151). In No. 710, the stranding was caused by completely incompetent seamanship and navigation (Record in No. 710, 28-29).[3] In both cases, the request is made that this Court find that the accidents in-

[2] In the instant case, the petition presents a further question as to the use of war risk insurance as third party liability insurance (Pet. 6, 8). Inasmuch as the second question was neither reached nor passed upon by the Court of Appeals for the Second Circuit it will not be discussed in this brief in opposition.

[3] The *Branch*, the vessel involved in No. 710, struck a reef while proceeding up the inside passage from the Puget Sound area to an Alaskan port, as the direct result of the incompetence of the helmsman (Record in No. 710, 28-29). Receiving an order from the pilot to go left, the helmsman swung to the right; receiving a further call from the pilot to go hard left, the helmsman swung hard right, both swings to the right taking the vessel away from the safe channel and onto the Hammer Island reef (R. 28).

volved are to be classified as "consequences of hostilities or warlike operations" so as to bring them within the coverage of the war risk insurance binder issued by the United States. In the instant case, the basis for the request that the accident be considered a war risk is the fact that one of the vessels involved, the *YMS-12,* was a mine sweeper. The argument is made that a collision between a merchant ship and a warship during time of war is automatically a war risk (Pet. 6, 19-20). In No. 710, war risk coverage is said to exist by reason of the fact that the *Branch,* carrying cargo as an Army transport to Alaskan bases, is to be classified as a quasi-warship and that anything occurring during her voyage stems from her "warlike operation" (Pet. in No. 710, 5, 8).

We submit that the judgments of the court below in this case, and of the Court of Claims in No. 710, are entirely correct, following and applying controlling decisions of this Court, and that there is no need for review. Actually, both cases fall squarely within the rule announced, and the decision made, by this Court in *The Napoli* (*Queen Ins. Co.* v. *Globe Ins. Co.*), 263 U. S. 487. In *The Napoli,* Mr. Justice Holmes, for a unanimous Court, reaffirmed the rule, set forth as early as *Morgan* v. *United States,* 14 Wall. 531, that the distinction between marine insurance and war risk coverage was a problem of "narrow construction," to be resolved by an inquiry into the "cause nearest to the loss." 263

U. S. at 492, 493.[4] The controlling principle is thus clear. There remains, in given cases, a factual inquiry followed by the application of the principle. We do not suggest that factual inquiries in the field of legal causation are normally simple. However, in these cases, there can be no doubt as to the "cause nearest to the loss" in the sense in which those words were used in *The Napoli*, or, in fact, as to the sole cause of the accidents in any common sense meaning of the word. Here, the collision resulted from negligent navigation on the part of both vessels. In No. 710, the stranding resulted from the completely incompetent seamanship of those on board in swinging out of, instead of into, the safe channel. Both accidents are wholly comparable to the collision of two convoys which was held the "nearest cause of loss," and a marine risk, in *The Napoli, supra.*

2. The petitions for certiorari in these two cases employ an identical approach to avoid the impact of this Court's prior decisions. Mr. Justice Holmes' remark in *The Napoli*, 263 U. S. at 493, to the effect

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[4] Petitioner, in attacking the applicability of American decisions on the ground of difference in language between the coverage here and in such cases, overlooks the fact that the precise phrase here presented, "consequences of hostilities or warlike operations," was the clause before this Court in *The Napoli*, 263 U.S., at 490, 492. It should be noted that this Court found no distinction between the coverage of the clause and the war risk coverage involved in earlier cases such as *Morgan* v. *United States*, *supra*. See also the remarks of Judge Clark in the court below on this aspect of petitioner's argument (R. 152).

that there are "* * * special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * *," is put forward as a rule whereby this Court commanded a mechanical adherence to English decisional law (Pet. 7, 16; Pet. in No. 710, 6, 12). Assuming this automatic guide to judgment, the petitions then assert that the court below and the Court of Claims have failed to follow certain decisions, thus controlling, rendered by the House of Lords. Principal reliance in both cases is placed on *Attorney-General* v. *Adelaide Steamship Company* (*The Warilda*), [1923] A. C. 292, and *Board of Trade* v. *Hain Steamship Company* (*The Roanoke-The Trevanion*), [1929] A. C. 534. We submit that an adequate appraisal of Mr. Justice Holmes' observation and careful consideration of the English decisions, such as that contained in the excellent opinions of Judges Clark and Madden, does not yield the result for which the petitioners contend.

(a) It should first be noted that, fairly read, Mr. Justice Holmes' observation has no particular applicability to the situation presented by these cases. Behind his remark was the assumption that he was dealing with a mercantile matter, reflected in English decisional law, whose greatest source of authority consisted of the customs and usages of British underwriters, purveying both war and marine insurance to all nations. We are, of course, no longer dealing with a mercantile matter when de-

fining the relationship, under modern conditions, of marine and war risk insurance. On the contrary, it is only fair to characterize the problem as predominantly governmental. The non-governmental war risk insurer tends to disappear from the scene as soon as modern hostilities begin on any considerable scale. The question presented is no longer one of apportioning risk between two private insurance companies, and there is, accordingly, little need to keep in harmony with the practice in England, "the great field of this business * * *" (263 U. S. at 493). Rather, petitioners' contention amounts to no more than saying, as noted by the courts below (R. 158; Record in No. 710, 40-41), that the Government, as war risk insurer, becomes liable for all marine risks and perils, with minor exceptions, whenever hostilities begin. Again, as noted by the courts below, there would be little point in the continued existence in wartime of the marine insurance industry. There would be no justification for the payment of marine insurance premiums if substantially all risks during hostilities were to be classified as war risks, the logical result of the contentions contained in the petitions (R. 158; Record in No. 710, 41).

(b) Even if it be assumed that England is to provide a crucial point of reference in deciding cases involving insurance on ships and shipping, no different result from that reached below is compelled.

As already remarked, the underlying assumption of Mr. Justice Holmes' observation in *The Napoli* is that English decisional law accurately reflected English insurance usage and understanding as to coverage. It is probable that the 1923 and 1929 decisions upon which the petitions in these cases place principal weight were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I. But whatever the underlying occasion for certain expressions in these opinions, their reiteration by some of the law lords in *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691; obtained an immediate reaction from the British marine insurance industry which should preclude trans-Atlantic acceptance of those broad statements. In *The Coxwold*, Lord Wright pointed out that if the result of the English decisions was felt to be undesirable, the F. C. & S. Clause could be changed, stating that a "* * * contract can be changed if it does not work satisfactorily." [1942] A. C. 691 at 707.[5] The British underwriters in 1942 promptly changed the form of the F. C. & S. clause so as to make it clear that war risk coverage was limited to those occasions

[5] It should be noted that Mr. Justice Holmes made the same observation in *The Napoli*, referring to the power of the parties to "* * * shape their contract as they like * * *." 263 U.S. at 492.

when the warlike character of the operation was the direct and effective cause of loss (R. 159).[6]

(c) It should finally be noted that the English cases, upon which the petitions in this case and in No. 710 rely, by no means clearly support an attack on the decisions below. The opinion of the Court of Appeals in this case contains an excellent critical analysis of the major English cases. Throughout all of them, verbal adherence, at least, is paid to the use of causation as a means of dividing war and marine coverage. It is true that certain of the English judges have announced a so-called "umbrella" theory which looks beyond the nearest cause and constitutes, in fact, a change from the use of

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[6] In so far as marine insurance underwriters were concerned, the favorable aspects of the House of Lords decisions in the 1920's were static, conferring benefits only as to contracts already made and obligations already matured. As to future application, marine underwriters were obviously unwilling to accept the obsolescence which logically fell to their lot if substantially all risks were to be considered war risks. American underwriters displayed the same reaction to the extreme reading of *The Coxwold* and related decisions, here advocated by petitioners. At their annual meeting on October 8, 1942, the Association of Average Adjustors expressed a view that the "marine insurance world does not have to acquiesce in the views of the judges expressed in the *Coxwold* opinions * * *." The Chairman, Mr. F. Porter Gore, suggested that the "* * * F.C. & S. Clause may be redrafted so as to diminish the extent of the war risk element and build up the marine risk aspect sufficiently to justify continuance of the marine risk coverage at the prevailing high rates of premium: * * * *" *Minutes of the Annual Meeting of the Association of Average Adjustors of the United States*, October 8, 1942, p. 2612. Mercantile considerations of this character are obviously of no interest to petitioner, a self-insurer.

causation to a search for status, an attempt to outline mechanically the consequences of various physical situations class by class. Thus, it is said that any collision with a war ship is a war loss and that any merchant ship carrying war cargo to a forward base is a "quasi-warship", with the result that any eventuality which befalls her on her voyage is a "consequence of hostilities or warlike operations." Such theories are summarized in the speech of Lord Porter in *The Coxwold*, [1942] A. C. 691, 715-716. Throughout these cases, however, there is no clear abandonment of the rule of causation adhered to by this Court in *The Napoli*, and the actual holdings can all be explained on that basis. See analysis of these cases, and materials cited, by Judge Clark in his opinion in the court below (R. 153-156). On the contrary, two of the five law lords speaking in *The Coxwold*, the Lord Chancellor (Viscount Simon) and Lord MacMillan, rested their decision on the usual proximate cause inquiry. And the most recent decision by the House of Lords, *Liverpool and London War Risks Association, Limited* v. *Ocean S. S. Co., Limited* (*The Priam*), [1948] A. C. 243, indicates plainly that primary importance again attaches to proximate causation, as used in *The Napoli*, in apportioning risk as between war and marine insurance, and that status (*i.e.*, being engaged in a warlike operation) does not in and of itself automatically allocate the risk to the war insurer.

3. The question presented is not one of general importance. Contracts are no longer written with the language here involved. In the main, the allocation of risk between the United States and the marine underwriters, in claims arising out of World War II contracts, has been concluded as a result of general agreement and settlement. The instant case arises solely because petitioner chose to assume the marine risks as self-insurer and so is not embraced in any general settlement. Most of the cases listed in the petition for certiorari (Pet. 10-12) were brought by Standard or its subsidiary, Panama Transport Company. In so far as we can ascertain, there are no cases pending outside the Southern District of New York, with the exception of No. 710. There is thus no necessity for review by this Court in order to put widespread litigation at rest.

4. The conflict asserted by the petitions in this case and in No. 710 with the decision of the Court of Appeals for the Ninth Circuit in *General Insurance Co. of America* v. *Link* (*The Eastern Prince-U. S. S. Roustabout*), 173 F. 2d 955, is not such as to require resolution. As noted above, all of the pending litigation is controlled by the decision of the court below in this case, and post-World War II controversy of this character will be governed by

different clauses.[7] Moreover, as pointed out by the court below (R. 158-159), the decision in the *Link* case stemmed from an erroneous application of Mr. Justice Holmes' observation in *The Napoli* and a failure to follow or give weight to controlling decisions of this Court and other federal courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1950.

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[7] The Ninth Circuit remarked that the *Link* case "is interesting as one of the last, if not the last, construing the conventional F. C. & S. clause, universally used by insurers since 1883, since both the American and British underwriters have now modified their war liability exclusion clauses to meet the conflicting decisions of the British and American cases." 173 F. 2d, at 956, fn. 1.

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Nos. 27 and 28

In the Supreme Court of the United States

OCTOBER TERM, 1950

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER

v.

UNITED STATES OF AMERICA, AS OWNER OF THE UNITED STATES SHIP YMS-12

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER OF THE STEAM TANKER JOHN WORTHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 78-95) is reported at 81 F. Supp. 183. The opinion of the United States Court of Appeals for the Second Circuit (R. 102-114) is reported at 178 F. 2d 488.

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1949 (R. 114). The petition for a writ of certiorari was filed on March 10, 1950, and was granted on June 5, 1950 (R. 116). The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a collision between a merchant ship and a warship, caused by the negligent navigation of both vessels, is converted from a marine risk to a war risk, for insurance purposes, simply by virtue of the fact that one of the vessels was a naval mine sweeper engaged in its work.

2. If the answer to the first question is in the affirmative, then the collision is a risk assumed by a war risk insurer and the war risk insurer is admittedly liable for any physical damage suffered by the merchant vessel in the collision. A second question is presented, however, whether the war risk insurer is also liable for the liability-over of the merchant ship to the warship for any physical damage suffered by the latter in the collision.

CONTRACT PROVISIONS INVOLVED

The war risk endorsement of the standard marine and war risk policy of War Shipping Administration provides in pertinent part (R. 83):

> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause)

in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

The Free of Capture and Seizure Clause, delineating war risk insurance coverage, provides (R. 82):

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

Clause 20 of the time charter party entered into between petitioner and United States of America is set out in pertinent part in Appendix A, *infra*, pp. 50. The war risk binder of insurance issued by the United States to petitioner is set out in

pertinent part in Appendix B, *infra*, pp. 51-52. The collision clause of the standard marine and war risk policy of War Shipping Administration is set out in Appendix C, *infra*, pp. 52-53.

STATEMENT

These suits arose from a collision on December 16, 1942, between the United States Navy Ship *YMS-12* and the steam tanker *John Worthington*. The facts giving rise to the controversy are not in dispute, but are based on a stipulation of the parties (R. 68-70, 79).

The *YMS-12* was a mine sweeper of the United States Navy engaged in sweeping a buoyed channel in the approaches to New York harbor (R. 79). At the time of the collision the *YMS-12* was part of a mine sweeping formation of three ships proceeding seaward with mine sweeping gear streamed (R. 79). The *S.S. John Worthington*, owned by petitioner, was in ballast and outward bound in convoy (R. 79, 80). As it was at night, both ships were showing their proper running lights; in addition, the *YMS-12* was displaying three all-around green lights to indicate that it was a mine sweeping vessel towing mine sweeps (R. 79, 80). The weather was clear and the visibility good (R. 80).

The district court found (R. 80), pursuant to stipulation, that the collision "was contributed to both by fault in the navigation of *S.S. John Worthington* and fault in the navigation of the United States Ship *YMS-12*, consisting of failures on the

part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." Only the mine sweeper sustained physical damage as a result of the collision (R. 80).

At the time of the collision the *John Worthington* was on a time charter to the United States (R. 80). Clause 20 of the charter party (*infra*, p. 50) provided that the United States was to furnish insurance on the *Worthington* "under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration," and petitioner was to assume or insure against all other risks. Petitioner chose to assume, rather than to insure, marine risks (R. 84). Pursuant to the provisions of the charter party, the United States issued a war risk binder of insurance to petitioner, which binder was in force at the time of the collision (R. 81). By the terms of the war risk binder (*infra*, pp. 51-52), the United States insured against "war risks only," and the binder and insurance were made subject "to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder * * *."

War risk coverage, then, was to be determined with reference to the standard marine and war risk policy of War Shipping Administration, referred to in the charter and in the binder. This

policy contained the following F. C. & S. Clause (*supra*, p. 3), excluding war risk insurance:

> F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war-risk endorsement remains in force.

The war risk endorsement of said policy (*supra*, pp. 2-3), stated:

> It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

Thus, the United States provided war risk insurance for the *John Worthington* by assuming those risks excluded from the usual marine hull form by the customary Free of Capture and Seizure (F. C. & S.) clause (R. 80-84).

The instant proceeding was instituted by a libel filed by the United States, as owner of the *YMS-12*, against the *John Worthington* to recover $150,000 on account of the damage sustained by the *YMS-12*

(R. 2-6). Petitioner's answer (R. 6-15) raised the defense, *inter alia*, that, should the *John Worthington* be found at fault, petitioner's liability was covered by the war risk insurance provided by the United States (R. 14). Petitioner also filed a cross libel (R. 19-26) against the United States as insurer for the recovery of any sum which it might be compelled to pay with respect to collision damages and for the costs and expense incurred in defending the collision suit (R. 25-26). The district court found that petitioner was liable to the United States for one half of the collision damages to the *YMS-12* since both vessels were at fault (R. 86). It held, however, that the collision was "a consequence of the warlike operation of *YMS-12*" (R. 87), and that the war risk insurance issued by the United States covered petitioner's collision liability to the United States as owner of the *YMS-12*, as well as any physical damage which might have been (but was not) suffered by the *Worthington* (R. 90-94). Further, the district court held the United States bound to indemnify petitioner, under the war risk insurance, for the cost of defending the collision suit (R. 95). Judgment was entered accordingly (R. 95-96).

On appeal, the district court judgment was reversed (R. 114-115). The court below found that the effective cause of the accident was not the warlike operation of the *YMS-12* but the negligence in navigation on the part of both vessels, that any

loss which might have resulted to the owners of the *Worthington* was due to a normal marine risk, that the war risk insurance was not applicable, and, therefore, that the United States was not liable as insurer (R. 112-113). Thus, the United States as owner of the *YMS-12* was entitled to collect from petitioner one half the damage to the vessel (R. 113). On this view, it was, of course, unnecessary to consider the question of whether the war risk insurance provided by the United States covered liability-over on the part of petitioner as the result of the accident, as well as any physical damage which might have occurred to the *Worthington*, and the court below did not pass upon that question (R. 113).

SUMMARY OF ARGUMENT

The problem raised by this controversy is one of allocation of risk as between two insurers. The ultimate issue to be decided by this Court is whether the United States, as war risk insurer of the *Worthington*, assumed the *Worthington's* liability-over to the United States, as owner of the *YMS-12*, *i.e.*, the collision liability of the owner of the *Worthington* springing from the accident, which was due to the negligence of both vessels. In arriving at the answer, two inquiries, one contingent, however, on the result reached in the first, must be made. The first question to be answered is whether the negligent collision between the *Worthington* and the *YMS-12* was converted from a ma-

rine risk to a war risk, a "consequence of hostilities or warlike operations," solely by virtue of the fact that the *YMS-12* was engaged in a warlike operation at the time of the accident. If not, the collision cannot be classified as a war risk, and the obligation of the United States as war risk insurer of the *Worthington* cannot be invoked. If, however, the collision be deemed a war risk assumed by the United States, then a further inquiry is necessary, whether the war risk insurance issued by the United States covered the liability-over of the *Worthington*, as well as any physical damage which the tanker might have sustained.

I

Although the precise issue involved here has not been before this Court, the problem of establishing a proper line of demarcation between marine risks and war risks is not novel to the courts of this country. In the consideration of these cases, our courts have consistently denied that a collision between a merchant ship and a warship is converted *ipso facto* into a war risk simply because one of the vessels was engaged in a warlike operation at the time of the accident. Rather, the question of whether or not wartime loss or damage is to be covered by marine or war risk insurance has been resolved by an inquiry into the predominant, the proximate, cause of the accident. Thus, the loss is held to be a war risk only when the domi-

nant and effective cause of the loss was an act of war or a warlike operation.

Application of these principles of legal causation to the present situation compels the conclusion that the loss was a marine risk. The cause of the collision between the *Worthington* and the *YMS-12* was the negligence in ordinary navigation on the part of both vessels. The accident was in no way the proximate consequence of the fact that the *YMS-12* was engaged in towing mine sweeps. The result, then, is that the collision was not a "consequence of hostilities or warlike operations," and thus was not a risk assumed by the United States as war risk insurer.

Petitioner's essential contention is that the issue presented here is a novel one, and that in the absence of precise precedent this Court should follow the alleged "conformity rule" laid down by Mr. Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*), 263 U. S. 487, 493, a rule said to command strict adherence to the English decisions. It is then asserted that under English law a collision between a merchant ship and a warship is automatically a war risk, regardless of the cause of the collision or the circumstances. This formalistic approach is not justified. It is doubtful that Mr. Justice Holmes' observation in *The Napoli* is even applicable in the circumstances presented here, since war risk insurance is no longer mercantile but governmental and since the particular English

war risk rules for which petitioner contends have been repudiated by the marine insurance industry. Certainly, his remark established no true "conformity rule," nor can we conceive that the Court intended to establish such a mechanical rule requiring adherence to the English cases where they run counter to the principles of the American cases or reach erroneous results.

II

In the event that the collision is deemed a peril insured against, then the United States, since it is responsible for the proximate results of a risk insured against, must indemnify petitioner for any physical damage suffered by the *Worthington*. However, petitioner's liability-over to the owner of the *YMS-12*, a liability imposed by operation of law, was caused solely by the negligent navigation of the *Worthington's* mariner. Thus petitioner's liability-over is not the proximate consequence of the risk of the collision. Nor can such liability be considered a "consequence of hostilities or warlike operations." The only circumstance of war surrounding the accident was the fact that the *YMS-12* was engaged in the operation of towing minesweeps. It can scarcely be contended that the negligent navigation of the *Worthington's* pilot was in any way consequent upon that operation. We think it clear, therefore, that the war risk insurance issued by the United States did not cover petitioner's

liability-over. This result accords with the pertinent English war risk decision (*Adelaide Steamship Co., Ltd* v. *Attorney General (The Second Warilda)*, [1926] A.C. 172), and applies the principles of liability-over laid down by this Court in the marine insurance case of *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351.

ARGUMENT

Introductory Statement

This controversy grew out of a collision between the tanker *John Worthington* and a mine sweeper, the *YMS-12*, wherein the warship was damaged and the tanker was not. Both vessels were at fault. The United States, as owner of the *YMS-12*, sought to recover from petitioner, owner of the *Worthington*, one half the collision damages suffered by the *YMS-12*. Petitioner, a self insurer as to marine risks, sought to offset the recovery of such damages by contending that its liability to the United States was covered by war risk insurance issued by the United States to it. The problem thus raised is one of allocation of risk as between two insurers. The ultimate issue to be decided by this Court is whether the United States, as war risk insurer of the *Worthington*, assumed the *Worthington's* collision liability, springing from the accident, to the United States as owner of the *YMS-12*. This raises a two-fold inquiry. The first question to be answered is whether the collision between the *Worth-*

ington and the *YMS-12* can be classified as a war risk. If not, the obligation of the United States as war risk insurer of the *Worthington* cannot be invoked. If the collision be deemed a war risk assumed by the United States, then a further inquiry is necessary; whether the war risk insurance issued by the United States covered collision liability running from the *Worthington* to the *YMS-12;* as well as any physical damage which the tanker might itself have sustained.

The first inquiry, the question of whether the collision was a risk assumed by the United States as war risk insurer, involves the broad problem of distinguishing between marine and war perils. In past consideration of this problem, this Court has established certain principles to be employed in differentiating between marine and war risk coverage. The question of whether this collision was a war risk assumed by the Government is to be determined by the application of these principles, as well as the language affording the present war risk coverage, to the particular facts of the case. By the terms of the war risk binder (*infra*, p. 51) issued by the United States to petitioner pursuant to Clause 20 of their charter party (*infra*, p. 50), the United States agreed to insure petitioner's vessel against "war risks only." The binder and insurance were made subject, however, to the rules, regulations, and policy forms prescribed by the War Shipping Administration. Thus, the extent

of war risk coverage was to be determined by reference to the standard marine and war risk policy of WSA. The war risk endorsement of such policy (*supra*, pp. 2-3) bound the Government to assume the risks excluded from the policy by the F. C. & S. Clause of the policy (*supra*, p. 3). The United States therefore agreed to assume, *inter alia*, "any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *," the coverage provision relied upon by petitioner.

By the stipulated facts (R. 80), the collision "was contributed to both by fault in the navigation of *S.S. John Worthington* and fault in the navigation of the United States Ship *YMS-12*, consisting of failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." The precise question to be resolved, therefore, as found by the court below (R. 112-113), is whether the negligent collision of the *Worthington* and the *YMS-12* was a "consequence of hostilities or warlike operations" solely because one of the vessels was engaged in a warlike operation, sweeping mines, at the time of the accident.[1] We think it clear that the answer is

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[1] Petitioner, however, would twist the stipulation's simple and clear statement of the cause of the collision. Petitioner seizes upon the phrase "under the circumstances," states that one of the circumstances was the fact that the *YMS-12* was towing mine sweeps, and thereby attempts to create the infer-

in the negative. Under settled American law, a negligent collision, a marine peril, is not converted from a marine risk to a war risk simply by virtue of the fact that one of the vessels involved in the collision is a war vessel. The dominant and effective cause of the loss must be the warlike character of the operation, and in negligent collision cases that is plainly not true. The collision, therefore, between the *Worthington* and the *YMS-12* was not a risk assumed by the United States. The result, then, is that the United States is not liable as insurer for any of the losses resulting from the collision, including the collision liability of petitioner, the owner of the *Worthington*.

Petitioner, however, seeks to have this Court reexamine and change the established principles which classify this collision as a marine risk.

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ence that the collision was caused by the fact that the *YMS-12* was engaged in a mine sweeping operation at the time of the accident (Pet. 14-15; Br. 5, 13, 28). On its face, the fifth paragraph of the agreed stipulation of facts refutes this argument (R. 80). It states only the ultimate fact that the parties are agreed that the accident was a result of negligent navigation on the part of both ships under the circumstances. Nowhere does the stipulation contain a reference to any causal connection between the *YMS-12's* mine sweeping operation and the collision. Nor is there any proof in the record that the fact that the *YMS-12* was mine sweeping, rather than engaged upon some other mission, in any way caused or contributed to the collision. Thus, there is no room for speculation as to whether the fact that the *YMS-12* was towing mine sweeps caused the collision or that it was a factor in rendering the conduct of those in charge of the *YMS-12* negligent. In connection with this contention, see the remarks of Judge Clark in the opinion below (R. 113).

Substantially its entire argument is that the precise factual situation involved here has not been passed on by this Court; and that, in accordance with Mr. Justice Holmes' remark in *Queen Insurance Co.* v. *Globe Ins. Co.*, (*The Napoli*), 263 U. S. 487, 493, that there are "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *," this Court must adhere to English decisional law. Petitioner then asserts that, under English law, a collision between a merchant ship and a warship during time of war is automatically a war risk, a "consequence of hostilities or warlike operations."

Admittedly, the precise factual situation involved herein has not been before this Court. However, the Court has often dealt with the problem of differentiating between marine insurance and war risk insurance and has emphasized that, in order for a war risk insurer to be liable, it is not enough that a vessel merely be engaged in a warlike operation, but that the dominant and effective cause of the loss must be the warlike character of the operation. And the abandonment of this well-settled principle is neither required nor justified by petitioner's reference to the observation of Mr. Justice Holmes in *The Napoli*. The English view on problems in this field is, of course, to be considered along with other materials. There is, however, no binding rule of automatic adherence to English judgments, and Mr. Justice Holmes did

not suggest such a principle. We submit that there is no need to change the established principles and no merit to petitioner's request that it be done.

Only in the event that the collision is adjudged a risk assumed by the United States does the second inquiry arise, the question of whether the war risk insurance issued by the United States covers the collision liability of the owner of the *Worthington*, as well as any physical damage which the tanker might have sustained. Here, again, petitioner's claim must fail. Under the terms of the war risk policy, the *Worthington's* liability-over arose, by operation of law, from the fact that the mariner of the *Worthington* was negligent, and was in no way consequent upon the warlike operation of the *YMS-12*.

I

The Collision Between the *Worthington* and the *YMS-12* Was Not a Peril Insured Against by the United States

A. *Under American Law, War Risk Insurers are Liable Only for Losses caused Directly and Proximately by Acts of War or Warlike Operations.*

The problem of establishing a proper line of demarcation between the losses consequent upon war as distinguished from marine perils is not new to our courts. During the Civil War, the United States made commercial arrangements with private shipowners to supply its forces in the

field. In charters accompanying such arrangements the Government assumed the "war risks" and the shipowners the marine risks. One of the first cases dealing with the problem is *Morgan* v. *United States*, 14 Wall. 531. There a vessel had been chartered to the United States upon the standard Civil War Quartermaster's charter party which required the owner to bear "the marine risk, the United States the war risk." After receiving on board troops and stores to carry to a theatre of active operations against the enemy forces, the vessel was ordered by a United States Quartermaster, for reasons stemming from "the exigencies of the service," to cross a bar under dangerous circumstances, against the judgment of both the master and the pilot of the vessel. Although the voyage was unquestionably an operation of the war, the consequent stranding was held to be marine rather than a war risk. This Court said (p. 535): "That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule, *'causa proxima non remota spectatur'* we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel."

Thus, *Morgan* v. *United States*, adopting the principles of legal causation in order to differentiate between marine and war perils, stands for the

proposition that the proximate cause of a loss must be warlike to make the loss a "war risk" and that it is insufficient merely to prove that a loss occurred during a war mission to bring it within the coverage of a war risk assumption.

Following the decision in the *Morgan* case, this Court and the Court of Claims on several occasions considered the term "war risk" occurring in charters between the Government and private shipowners. In accordance with the rule laid down in that case, the following were held to be marine, rather than war, risks: injury to a troop transport from drifting ice when Army orders compelled the voyage even though ice conditions made navigation unsafe, *Reybold* v. *United States*, 15 Wall. 202; damage from a leak sprung while the vessel was carrying military stores, *Goodwin* v. *United States*, 17 Wall. 515; a collision with a drifting derelict while the vessel was proceeding at full speed through dense fog pursuant to military orders, *Mott* v. *United States*, 9 Ct. Cl. 257; a collision, stranding, and bumping while the vessel was carrying men and horses to a theatre of operations, *New Orleans-Belize Royal Mail and Central American Steamship Co. Ltd.* v. *United States*, 239 U. S. 202; see also *Leary* v. *United States*, 14 Wall. 607.

Particularly in point is the case of *White* v. *United States*, 154 U. S. 661. There a vessel, against the wishes of the master, was ordered to land troops in a theatre of active operations. The

vessel was injured because the master of the vessel refused to obey the orders of the general in charge of the operation to move the ship into the stream after the troops and horses were discharged, orders designed to minimize the danger of stranding in the course of military operations. It is difficult to imagine a shipping operation more intimately connected with the prosecution of hostilities, yet the Court held the damage to be the result of the marine risk of negligent navigation, not a war risk. It said (p. 662):

> * * * If loss happened from a "war risk," that is to say, if the war was the proximate cause of the loss, the damage was to be made good by the government; but if it was caused by the refusal of the master to obey those in command of a military expedition to which the vessel was attached, the neglect of the master and not the war would be the proximate cause. This neglect of the master was a marine risk which the owner assumed. * * *

We think that these cases, with their emphasis on the search for the proximate cause of the loss, have an important bearing on the present inquiry. They stand squarely for the proposition that a negligent collision between a tanker and a mine sweeper is not to be considered a war risk simply because the mine sweeper happened to be engaged in a warlike operation.

Petitioner attempts to dismiss these cases as inapplicable because of the difference in language

between the coverage there and in the present situation. Petitioner argues (Pet. 22-23, Br. 39-40) that the phrase involved here, "consequences of hostilities or warlike operations," provides broader coverage than the term "war risk." No authority is cited for this proposition, nor does any such authority exist. There is certainly no language in *Ionides* v. *The Universal Marine Ins. Co.*, [1863] 14 C. B. (N.S.) 259, or *The Petersham*, [1919] 2 K. B. 692, mentioned at p. 22 of the petition and p. 39 of the brief, to support the argument. If anything, the situation is just the reverse of petitioner's contention, for, as remarked by Judge Clark in the court below (R. 104), the parties here listed some twenty-two risks as war risks, one of which was "consequences of hostilities or warlike operations," and regarded this phrase as only one component, of many, of "war risk."[2]

[2] Petitioner, relying on *Bogert* v. *United States*, 2 Ct. Cl. 159, makes the contention that the term "war risk" construed in the earlier cases is distinguishable from the phrase at issue in that it had the limited meaning of "acts of the public enemy, or the casualties of war" (Pet. 20-22, Br. 35-37). It is difficult to see how this argument furthers petitioner's position; certainly the term "casualties of war" is broad enough in its general meaning to have included any loss or damage occurring in those cases. In any event, the results reached there by this Court were arrived at by an inquiry along the lines of proximate cause, not by an inquiry into whether or not the stranding or collision involved was an act of the public enemy or a casualty of war. In this connection, it should be noted that petitioner cites and quotes from the lower court *Morgan* decision, and other very early Court of Claims decisions, and does not even refer to this Court's later opinions in this line of cases (see Pet. Br. 35-37).

Finally, and very importantly, it should be noted that the phrase "consequences of hostilities or warlike operations" was before this Court in *The Napoli*, 263 U. S. 487. Certainly in that case, the Court found no distinction between the coverage provided by that phrase and the term "war risk" involved in the earlier cases. Indeed, it treated the coverage provided by the two terms as coextensive. Mr. Justice Holmes' opinion for the Court, in holding that a collision between two ships sailing without lights and under convoy was not a war risk, reaffirmed the rule, set forth in *Morgan* v. *United States* and the earlier cases, that war risk insurance assumptions were to be narrowly construed, and that the distinction between marine insurance and war risk coverage was to be resolved by an inquiry into the "nearest cause of loss." 263 U. S. at 492, 493. Thus, the Court applied the principle of proximate causation enunciated in the *Morgan* and other Civil War charter cases to the determination of whether the loss was to be classified a "consequence of hostilities or warlike operations." It is clear that the basic issue has always been the same, the problem of war risk assumption, of apportioning between marine risks and war risks. And the approach consistently employed by this Court, the search for the proximate or dominant cause of the loss in order to determine whether the loss be classified a "war risk", is the key to the present inquiry.

Two recent district court decisions, involving the phrase under inquiry, further illustrate the consistent approach of the American courts to the problem of distinguishing between marine and war risk insurance coverage, and are indicative of the result to be reached here. In *Standard Oil Co. of New Jersey et al. v. St. Paul Fire & Marine Ins. Co.*, 59 F. Supp. 470 (S.D. N.Y.), an oil tanker was prevented from discharging its cargo at Havre, France because of the German invasion. It then proceeded to England and, while off the port of Falmouth, signalled for a pilot. While following through the mined harbor a patrol boat which flew the British naval ensign and which had signalled "follow me," the tanker struck a submerged rock and was severely damaged. In holding that the loss was not a "consequence of hostilities or warlike operations" the court said (p. 474):

> It is well settled that the fact that there is a war in progress, or that there are surrounding circumstances of war, in and of themselves, are not sufficient to exclude coverage under a policy containing a F. C. & S. clause, but it must be shown that a cause of loss contemplated by such a clause was the cause "nearest to the loss". [*The Napoli*], 263 U. S. 487.

The case of *Meseck Towing Lines, etc. v. Excess Ins. Co. Ltd.*, 77 F. Supp. 790 (E.D. N.Y.) again illustrates the use of these principles of causation in allocating risk. The issue there was whether

a collision in New York harbor between a tug and a Navy submarine chaser outbound for patrol duty, due to the joint negligence of the two vessels, was "a consequence of hostilities or warlike operations." In the course of an opinion holding the collision to be a marine risk, the court said (p. 793):

> * * * the inquiry should be whether the collision was in consequence of a warlike operation, not did it happen in the course of a warlike operation.

This survey of the pertinent American cases compels the conclusion that under American law a collision between a merchant ship and a warship is not converted *ipso facto* into a war risk simply because one of the vessels was engaged in a warlike operation at the time of the accident, but that the question of whether or not a collision was a "consequence of hostilities or warlike operations" is to be resolved by an inquiry into the predominant, the proximate, cause of the accident.[3] We submit, therefore, that the American rule was accurately summarized by the court below (R. 105):

> * * * a loss will be held to be a "consequence of hostilities" and to come within the

[3] For further examples of the test of proximate causation as the basis for distinguishment between marine risks and war risks, see the analogous cases of *Standard Oil Co. of New Jersey* v. *United States*, 267 U. S. 76; *Reinold* v. *United States*, 167 F. 2d 556 (C. A. 2), certiorari denied, 335 U. S. 824; *Muller* v. *Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759 (C. A. 2); *Dennehy* v. *United States*, 15 F. 2d 196 (S.D. N.Y.).

limits of war risk insurance where one of the vessels party to the loss is both engaged in a warlike operation and so navigating as a result of the war that it creates a peril. To put it another way, not only must the vessel's mission be one of war, but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe.

B. *The Collision Between the* Worthington *and the* YMS-12 *Was a Marine Risk Since the Proximate Cause of the Collision Was Ordinary Negligent Navigation on the Part of Both Vessels.*

Application of the foregoing principles of legal causation to the present situation permits but one result. Here, there can be no doubt that the effective and proximate cause of the collision between the *Worthington* and the *YMS-12* was the negligence in ordinary navigation on the part of both vessels. The only circumstance of war surrounding the accident was the fact that at the time the *YMS-12* was engaged in the operation of towing mine sweeps. At most, however, this is a condition, not the dominant cause, of the accident, for, as we have seen previously, *supra*, pp. 14-15, fn. 1, there was no causal connection between the negligence of the mariner in charge of the *YMS-12* and the fact that the vessel was on a warlike operation. The negligence causing the disaster was the failure of the mariner of the war vessel, and of the *Worthington*, to observe the ordinary rules of safe

navigation for the prevention of collisions. It is too well settled to require citation that such a risk is a peril of the sea, a marine risk, customarily and ordinarily assumed by marine underwriters. It is not the sort of hazard of war which it was contemplated that the Government would assume.[4]

We submit, therefore, that the collision was plainly not a "consequence of hostilities or warlike operations", as that term was used in the F. C. & S. clause, and thus was not a risk assumed by the Government pursuant to the war risk binder issued by it to petitioner.[5] It is, of course, axio-

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[4] Petitioner's argument (Pet. 17-18, Br. 32-33) that negligence cannot be an intervening cause which takes a loss out of the war risk category, since insurance against a specified peril is not affected by the cooperation or contribution of another cause or of negligence contributory to the loss, is irrelevant. This argument simply begs the issue, for it assumes, as its major premise, that the collision between the *Worthington* and the *YMS-12* is initially a war risk. Only if it be first granted that the "specified peril" is a war risk does petitioner's contention have any bearing. Here, the peril was a peril of the sea, a marine risk, and neither initially nor ultimately a war risk.

[5] In accord with the Government's position is the case of *Meseck Towing Lines, etc.* v. *Excess Ins. Co., Ltd.*, 77 F. Supp. 790 (E.D. N.Y.), where the court refused to hold a collision between a warship and a tug to be a consequence of hostilities or warlike operations because "the 'cause nearest to the loss' [citing *The Napoli, supra*] i.e. the proximate, not the remote cause, must be held to be negligence in navigation in a peaceful harbor. That the vessel in collision with the civilian ship chanced to be a warship constitutes at most a remote but not a proximate cause." 77 F. Supp. at 793. Similarly consistent is the finding by the district court in *The Napoli* that the collision involved there was a marine risk since "the navigators of both Napoli and Lamington failed in their ship management to exercise the ordinary care and skill of their calling. Therefore such negligence was the proximate cause of the collision, and the loss must fall upon the marine under-

matic that if the Government did not assume the risk of the collision, it did not assume the risk of any of the consequences of the collision. The result, then, is that the United States is not liable as the war risk insurer of the collision liability of petitioner.

We believe this to be the fair and common sense result, for it is reached by the application of the principles of legal causation, the method consistently followed in the insurance field in the determination of the liability of underwriters. It is to be noted, moreover, that this conclusion is further fortified by the fact that a collision is *prima facie* a peril of the sea, and by the consequent rule that the burden of proof in this sort of situation is on one who claims that the loss resulted from a war risk, rather than a marine risk. See *Reybold* v. *United States*, 15 Wall. 202; *United States* v. *Standard Oil Co. of New Jersey*, 291 Fed. 1 (C. A. 3), reversed on other grounds, 267 U. S. 76; *The Napoli*, 282 Fed. 976 (C. A. 2), affirmed, 263 U. S. 487. Cf. *Western Assur. Co. of Toronto* v. *Shaw*,

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writers." 278 Fed. 770, 782 (S. D. N. Y.), affirmed, 282 Fed. 976 (C. A. 2), affirmed on other grounds, 263 U. S. 487. Cf. *White* v. *United States*, 154 U. S. 661.

Petitioner attacks the use by the court below of the *Meseck* case by referring to a conclusion of law included in the A. M. C. report of the case, but not in the Federal Supplement report (Pet. Br. 46). Whatever effect should be given to this finding, it does not convert the case into an authority which supports petitioner's position. The rationale of the decision is directly opposed to petitioner's thesis. Cf. the reading given by the *Meseck* opinion to the English decisions upon which petitioner relies. 77 F. Supp. at 792-793.

11 F. 2d 495 (C. A. 3), certiorari denied, 273 U. S. 698. That petitioner has not met this burden is apparent from the stipulated facts which show agreement that the cause of the collision was "failures on the part of both vessels to comply with the applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." As the lower court pointed out (R. 113), "this finding not only fails to satisfy the burden on [petitioner] to show that the loss was a consequence of hostilities, but rather is a positive indication that the loss was due to the normal marine risk of failure to comply with the applicable rules and the requirements of good seamanships."

C. *House of Lords Decisions Are Not Conclusive of the Issue Here and Should Not Be Accepted.*

To avoid the impact of this Court's prior decisions, and the result reached by the court below, only one argument is advanced seriously by petitioner. As the basis for its request that the collision be held a war risk, petitioner argues (Pet. 16-26, Br. 18-29) that the precise issue presented here has not been passed upon by this Court, and that in the absence of precedent this Court is bound by a rule of law said to be embodied in the observation of Mr. Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*) that there are "special reasons for keeping in harmony with the ma-

rine insurance laws of England, the great field of this business * * *." 263 U. S. 487, 493. This remark of Mr. Justice Holmes is put forward as a "conformity rule," whereby this Court commanded mechanical adherence to English decisional law (Pet. 15, 24, 25; Br. 20). Relying principally on *Attorney General* v. *Adelaide Steamship Company* (*The Warilda*), [1923] A. C. 292; *Board of Trade* v. *Hain Steamship Company* (*The Roanoke—The Trevanion*), [1929] A. C. 534; and *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), [1942] A. C. 691, petitioner then states the English law to be that a collision between a merchant ship and a warship during time of war is automatically a war risk. We think that this argument will not bear scrutiny.

1. It is doubtful that Mr. Justice Holmes' remark in *The Napoli* is even applicable to the situation presented here. Behind his remark was the assumption that he was dealing with a mercantile matter, reflected in English decisional law, whose greatest source of authority consisted of the customs and usages of British underwriters, purveying both war and marine insurance to all nations. Uniformity of decisional law would be a convenience to private underwriters on both sides of the Atlantic. But we are, of course, no longer dealing with a mercantile matter when defining the relationship, under modern conditions, of marine and war risk insurance. On the contrary, it is only

fair to characterize the problem as predominantly governmental. The non-governmental war risk insurer tends to disappear from the scene as soon as modern hostilities begin on any considerable scale. See S. Rep. No. 1942, 76th Cong., 3d sess., pp. 2, 3-4, 5-7; H. Rep. No. 2499, 76th Cong., 3d sess., pp. 2-4. The question presented is no longer one of apportioning risk between two private insurance companies, and there is, accordingly, little need to keep in harmony with the practice in England, "the great field of this business * * *" (263 U. S. at 493).

Moreover, underlying Mr. Justice Holmes' observation was the assumption that English decisional law accurately reflected English insurance usage and understanding as to coverage, and should be followed for that reason. It is probable, however, that the decisions in *The Warilda, supra*, and *The Roanoke—The Trevanion, supra*, the cases relied on principally by petitioner, were not unmotivated by a national policy of shoring up the weakened financial structure of British marine insurance companies in the aftermath of World War I.[6] But whatever the underlying occasion for certain expressions in these opinions, their reiteration by some of the law lords in *Yorkshire Dale S. S. Co., Ltd.* v. *Minister of War Transport* (*The Coxwold*), *supra*, obtained an immediate reaction from the

[6] This observation gives rise to no need for protection of the integrity of the House of Lords. See Pet. Br. 48. It is well understood, we believe, that considerations of national policy and national need frequently and properly motivate judicial decision.

British marine insurance industry which should preclude trans-Atlantic acceptance of those broad statements. In *The Coxwold*, Lord Wright pointed out that if the result of the English decisions was felt to be undesirable, the F. C. & S. Clause could be changed, stating that a "* * * contract can be changed if it does not work satisfactorily." [1942] A. C. 691 at 707. The British underwriters in 1942 promptly changed, without any increase in premiums, the form of the F. C. & S. Clause so as to make it clear that war risk coverage was limited to those occasions when the warlike character of the operation was the direct and effective cause of loss.[7] As pointed out by the editors of *American Maritime Cases*, [1943] A. M. C. 130, 131, this change was adopted "to correct and restore the distribution of marine and war risk" as affected by the *Coxwold* decision; it also "sets aside" (*id.*, at 130) the result of the *Roanoke-Trevanion* and *Warilda* cases.[8] Thus, with this action of the

[7] "* * * but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power." F. C. & S. Clause (1942), [1943] A. M. C. 130, 131.

[8] In so far as marine insurance underwriters were concerned, the favorable aspects of the House of Lords decisions in the 1920's were static, conferring benefits only as to contracts already made and obligations already matured. As to future application, marine underwriters were obviously unwilling to accept the obsolescence which logically fell to their lot if substantially all risks were to be considered war risks. American underwriters displayed the same reaction to the extreme reading of *The Coxwold* and related decisions,

British underwriters, all demand for conformity because of business expediency ceased. See also the remarks of the court below on this matter (R. 111).

2. Even if it be assumed that Mr. Justice Holmes' remark in *The Napoli* established the principle of automatically and uncritically following analogous English decisions in the absence of any direct Supreme Court authority, it should be noted that the English cases relied on by petitioner by no means clearly support an attack on the decision below. The opinion of the Court of Appeals in this case contains an excellent critical analysis of the major English cases. Throughout all of them, verbal adherence, at least, is paid to the use of causation as a means of allocating war and marine coverage. It is true that certain of the English judges have announced a so-called "umbrella" theory which looks beyond the nearest cause and constitutes, in fact, a change from the use of causation to a search for status, an attempt to outline mechanically the consequences of various physical

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here advocated by petitioners. At their annual meeting on October 8, 1942, the Association of Average Adjustors expressed a view that the "marine insurance world does not have to acquiesce in the views of the judges expressed in the *Coxwold* opinions * * *." The Chairman, Mr. F. Porter Gore, suggested that the "* * * F. C. & S. Clause may be redrafted so as to diminish the extent of the war risk element and build up the marine risk aspect sufficiently to justify continuance of the marine risk coverage at the prevailing high rates of premium. * * *". *Minutes of the Annual Meeting of the Association of Average Adjustors of the United States*, October 8, 1942, p. 2612. Mercantile considerations of this character are obviously of no interest to petitioner, a self insurer.

situations class by class. Thus, it is said that any collision with a war ship is a war loss and that any merchant ship carrying war cargo to a forward base is a "quasi-warship," with the result that any eventuality which befalls her on her voyage is a "consequence of hostilities or warlike operations." Such theories are summarized in the speech of Lord Porter in *The Coxwold*, [1942] A. C. 691, 715-716. Throughout these cases, however, there is no clear abandonment of the rule of causation adhered to by this Court in *The Napoli*, and the actual holdings can all be explained on that basis. See analysis of these cases, and materials cited, by Judge Clark in his opinion in the court below (R. 105-108). For example, two of the five law lords speaking in *The Coxwold*, the Lord Chancellor (Viscount Simon) and Lord MacMillan, rested their decision on the usual proximate cause inquiry. And the most recent decision by the House of Lords, *Liverpool and London War Risks Association, Limited* v. *Ocean S. S. Co., Limited* (*The Priam*), [1948] A. C. 243, indicates plainly that primary importance again attaches to proximate causation, as used in *The Napoli*, in apportioning risk as between war and marine insurance, and that status (*i.e.*, being engaged in a warlike operation) does not in and of itself automatically allocate the risk to the war insurer.

3. In any event, petitioner's argument that these English cases must be followed fails, for it is based

on the fallacious premise that Mr. Justice Holmes intended to require the acceptance of a special "conformity rule." On the contrary, his language was a passing acknowledgment of the practical mercantile considerations involved in the shipping business, a particular expression of the general observation, frequently made by this Court and other federal courts, that "it is desirable, if there is no injustice, that the maritime law of this country and of England should agree." *The Eliza Lines*, 199 U. S. 119, 128.[9] This Court has, however, never felt itself bound by these mercantile considerations urging uniformity. Whenever it felt that justice, or the reason of the matter, or the American law so required, the Court has not hesitated to depart from British maritime law. See, *e.g.*, *Peters* v. *Warren Ins. Co.*, 14 Pet. 99; *Lanasa Fruit Steamship and Importing Co.* v. *Universal Ins. Co.* (*The Smaragd*), 302 U. S. 556; *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430. Clearly, then, Mr. Justice Holmes' remark cannot be treated as stating a special rule of law which commands automatic adherence to the English decisions in the marine insurance field. Certainly this Court does not so construe it. *E. g.*, *The Smaragd*, *supra*;

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[9] Consideration of English law in insurance matters is but one aspect of respect for English views in the maritime field generally. That recognized and long continued cleavages between English and American rules can exist in important admiralty fields is familiar. See Brief for the United States, p. 22, *Alcoa Steamship Co.* v. *United States*, No. 271, October Term, 1949.

Aetna Ins. Co. v. *United Fruit Co., supra.*[10] Accordingly, as in other maritime cases, it is always open to a party to show that the English decisions reach erroneous results or run counter to the American cases. There can be no such formalistic approach as that adopted by petitioner—mechanical reliance on English law.[11]

We have pointed out above that the decision below was reached by the application of certain principles of legal causation laid down by this Court in prior decisions dealing with marine and war risk insurance coverage. *Supra,* pp. 17-28. Moreover, the result below, denying liability on the part of the United States as war risk insurer except for losses directly and proximately caused by acts of war, involves no radical departure from the general principles governing insurance law, and is entirely in accord with the well-settled rule that insurers are liable only for the proximate, not the remote, cause of the loss. See *e.g., Peters* v. *War-*

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[10] For this reason, the authority of the case of *General Ins. Co. of America* v. *Link*, 173 F. 2d 955 (C.A. 9), the decision relied on by petitioner as stating the American view, is seriously weakened. By the court's own statement (p. 956), and by petitioner's admission (Pet. 14, 24; Br. 20, 21-22), the result there was reached, not by application of the principles of proximate causation or by a fresh consideration of the issue, but by treating the English cases as controlling, even though the court recognized that those opinions are in conflict with the applicable American cases.

[11] That petitioner's position is purely formalistic is revealed by its contention that mercantile considerations are not the basis of the suggestion typified by Mr. Justice Holmes' remark in *The Napoli.* Pet. Br. 20. It is difficult to think of any other reason why there should be agreement between the English and the American law in the admiralty field.

ren Ins. Co., 14 Pet. 99; *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351. On the other hand, the English opinions to which petitioner refers sharply depart from the established American principles of war risk insurance.[12] They are dubious precedents, often reaching their results on unrealistic or arbitrary grounds.[13] The rule which petitioner draws from them, and which is here urged upon the Court, amounts to no less than saying, as noted by the court below (R. 110), that the Government, as war risk insurer, becomes liable for all marine risks and perils, with minor excep-

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[12] In this connection, reference might be made to petitioner's professed acceptance of the application of the doctrine of causation in determining coverage. Pet. Br. 29-32, 33. Petitioner's true position, and that which necessarily flows from the statements in the English decisions upon which petitioner relies, is completely different. The language of causation is not abandoned. See, *e.g.*, excerpts quoted at pp. 23-24 of petitioner's brief. Actually, the principal English opinions cited by petitioner assume that the category of war risk attaches to a vessel's operation by virtue of character of voyage or cargo; and that everything thereafter befalling is a consequence of the status thus given, without reference to causal connection. See, *e.g.*, *The Coxwold*, [1942] A. C. 691, 711. The result of this abandonment of causation, developed in collision and stranding cases, is so inflexible that even English courts must take refuge in somewhat illogical physical distinctions to avoid application of the status theory. Cf. *The Clan Matheson*, [1929] A. C. 514. Thus, in *The Priam*, marine insurance coverage was found to apply in the case of heavy weather damage to commercial cargo on a ship concededly on a warlike operation under the English rule, on the ground that, being struck by a sea, the ship was passive rather than active [1948] A. C. 243, 257. This would seem to resurrect the archaic aspects of the use of *deodands* to solve modern insurance coverage problems. Cf. Holmes, *The Common Law*, pp. 24 ff. (1938 ed.).

[13] For a criticism and description of the English cases, see Note (1941) 51 Yale L. J. 674.

tions, whenever hostilities begin—at least where warships or war activities are involved.[14] Again, as noted by the court below, there would be little point in the continued existence in wartime of the marine insurance industry. There would be no justification for the payment of marine insurance premiums if substantially all risks during hostilities were to be classified as war risks, the logical result of petitioner's contention (R. 110). The insurance industry, both here and in England, has rejected the principles which petitioner desires to substitute for the war risk insurance rules previously accepted in this country. *Supra*, pp. 31-32. We cannot but feel that the insurance world is well rid of these novel and expansive principles. It would be a mistake, we submit, to accept them here in the place of the established rules properly applied by the court below.

II

Even If the Collision Were a Risk Assumed by the Government and It Were Liable for Any Physical Damage Which the *Worthington* Might Have Suffered, the Policy in Suit Does Not Insure Against the Liability of the *Worthington* or Its Owner to the United States Consequent Upon the Collision

In the event that the collision is deemed a "consequence of hostilities or warlike operations," and

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[14] This, of course, is directly contrary to the intention of the parties as expressed in Clause 20 of the charter party. By that clause (*infra*, p. 50), the Government assumed the war risks and petitioner agreed to insure or assume the marine risks.

thus a peril insured against, then admittedly any physical damage suffered by the *Worthington* would be the direct result of the warlike operation and the United States would be liable as insurer for the hull damage of the *Worthington*. But the *Worthington* suffered no damage, and this suit involves only petitioner's liability to the United States as owner of the *YMS-12*. There is, therefore, still a further question to be answered: whether the war risk insurance issued by the United States also covers the liability-over of the owner of the *Worthington*, *i.e.*, whether such collision liability can likewise be considered the direct result of the warlike operation of the *YMS-12*.

By the war risk endorsement to the policy in question (*supra*, pp. 2-3) the United States limited its liability to "* * * only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by the warranty." Thus, the United States agreed to assume the risks excluded by the F. C. & S. warranty. The F. C. & S. clause (*supra*, p. 3) provides in pertinent part:

> * * * this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *.
>
> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the

extent that their terms are inconsistent and only while such war risk endorsement remains in force.

The policy's collision or running-down clause is set out in Appendix C, *infra*, pp. 52-53. By its terms, the insurer agrees to indemnify the insured vessel's owner in the event the vessel comes into collision with another ship and becomes liable to pay and pays damages in respect of such collision. The issue presented in this inquiry, therefore, is whether the liability undertaken by an insurer in the collision clause is or is not a risk which would be excluded by the F. C. & S. clause as being a "consequence of hostilities or warlike operations." If this liability is such a risk as is excluded by the F. C. & S. clause, then, in accordance with the provisions of the war risk endorsement, it is assumed by the Government and the Government must indemnify petitioner. If not, the United States is not liable as war risk insurer.

1. We think the answer to this issue to be plain. If the collision be deemed a peril insured against, a "consequence of hostilities or warlike operations," then clearly any physical damage suffered by the *Worthington* would be the result of such risk and the Government would be bound to make such loss good since it is responsible for the proximate results of a peril insured against. It by no means follows, however, that petitioner's liability-over is the result of such risk. Petitioner's liabil-

ity to the United States as owner of the *YMS-12* did not proximately arise from the collision. Instead, petitioner's liability arose by operation of law—the duty, imposed by law, of the master to make amends for the negligence of his servants. Without the negligence of the *Worthington's* mariner, no loss would have been suffered by petitioner, no collision liability would have arisen. Clearly, then, the negligent navigation of the pilot of the tanker was the proximate cause of petitioner's liability.

We think this is settled by the decision in *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351. There, this Court held that a vessel's liability-over did not arise from the collision but from the negligence of the vessel's navigator. See also *The Barnstable*, 181 U. S. 464, 469. The Court, of course, was not concerned with the perils embraced in the F. C. & S. clause ("consequences of hostilities or warlike operations") but with the perils in the perils clause proper ("perils of the sea"). Surely, the same reasoning applies, however. If a liability-over was too remote and was not proximately caused by a "peril of the sea" (collision) because the proximate cause was negligence,[15] it is difficult to see how liability-over could

[15] "* * * In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and there-

be said to be proximately caused by a "warlike operation" (leading to a collision) since the liability-over here as well springs from the negligence of the vessel, and it can scarcely be contended that the negligent navigation of the *Worthington's* pilot was in any way consequent upon the fact that the *YMS-12* was engaged in the warlike operation of towing mine sweeps. Accordingly, we submit that petitioner's collision liability was not a risk excluded by the F. C. & S. clause, and that the United

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fore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

"The case at bar presents an illustration of both rules. So far as the brig Emily was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against; and the assured, showing that his vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it.

"This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the Virginian was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause." 14 How. at 6-367.

States therefore cannot be held as the insurer of such liability.

This result is in accord with the English view, expressed in the leading case of *Adelaide Steamship Co., Ltd.* v. *Attorney General* (*The Second Warilda*), [1926] A. C. 172. By the terms of the charter party between it and the vessel's owner, the Admiralty agreed to assume "those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause; 'Warranted free * * * from all consequences of hostilities or warlike operations * * *:' " Thus the form of words whereby the Crown assumed war risks was somewhat different from the situation at bar, but the risks assumed by the Crown were the same as those assumed by the United States, *i.e.*, "consequences of hostilities or warlike operations." There it was assumed ([1926] A. C. at 178, 181) that the hypothesized policy, from which the risks to be borne by the Admiralty were excluded, included a collision clause, similar to the one here. The issue was therefore the same as here, whether the liability undertaken by the collision clause was a risk excluded by the F. C. & S. clause as being a "consequence of hostilities or warlike operations." The House of Lords held that it was not, since such liability was not the proximate consequence of any warlike operation, but of the negligence of the master of the vessel.

There was also a second ground for the decision, based somewhat on the historical background of the collision clause. As a matter of insurance law, the collision clause was not strictly a part of the marine policy but an additional and independent contract superimposed upon the policy. The collision clause, therefore, could not have been excluded from the policy by the F. C. & S. warranty for it was never a part of the policy; "the subject matter on which this exclusion operates never included it." [1926] A. C. at 182. Thus, as the second ground of the decision, the House of Lords held that the F. C. & S. clause was not operative at all with respect to the collision clause.

It appears that our courts also consider a collision clause to be a separate and distinct covenant, super-imposed on the marine policy. In *Fireman's Fund Ins. Co.* v. *Globe Navigation Co.*, 236 Fed. 618 (C. A. 9), the court, in referring to a printed clause on the margin of the policy assuming collision liability, said (p. 631): "This *special contract* is known as the 'collision' clause, or, as it is better named, the 'running-down' clause." (Emphasis supplied.) And in *Western Transit Co.* v. *Brown*, 161 Fed. 869 (C. A. 2), the court remarked: "When it was desired to protect the owner against loss because of his liability for damage caused by his own ship to another ship, the running-down clause was inserted in *the ordinary policy*." (Emphasis again supplied.) It follows that a second argument can

be advanced to support the Government's position—the argument that the collision clause is not an integral part of the policy and thus cannot be excluded by the F. C. & S. clause since the latter does not operate at all with respect to it. The result, then, is that the United States did not assume petitioner's collision liability. Nor is the result affected by the existence in the war risk endorsement (*supra*, pp. 2-3) of the parenthetical phrase "including the Collision Clause" since the liability covered by that clause would not be excluded by the F. C. & S. warranty, and the war risk insurance covers only those risks excluded by that warranty. We believe, however, that the problem is best approached through an inquiry into the proximate cause of petitioner's liability-over. This is the method adopted by this Court in the *Sherwood* case and is the basic ground of the decision in *The Second Warilda*.[16] Thus, we prefer to rest our case on the former argument.

2. Petitioner's argument that the Government's war risk policy covers liability incurred as a result of negligent navigation by the mariners of the *Worthington* in the course of a commercial voyage is predicated almost entirely upon the proposition that the Government assumed such liability by the use of the parenthetical phrase "including the col-

[16] We, of course, do not contend that the result reached by the House of Lords is conclusive of the issue here. We do think, however, that the decision merits strong consideration by this Court since the rule there announced is not contrary to the American rule, but is entirely in accord with the principles laid down by this Court.

lision clause" in the war risk endorsement, in conjunction with a so-called "subordination clause" appended to the F. C. & S. Clause (Pet. 27-28, Br. 50-55).[17] Petitioner contends that the last sentence of the F. C. & S. clause (*supra*, p. 3)[18] is a "subordination clause which subjects the exclusions of the F. C. & S. Clause to the control of the war risk endorsement" (Pet. 27). Thus, it is said, the situation presented here is different from that in *The Second Warilda*, for the F. C. & S. clause is to be considered as containing the phrase "including the collision clause." As a result, petitioner argues that the liability undertaken in the collision clause is assumed by the United States since the collision clause is excluded from the policy by the F. C. & S. clause.

We find this line of reasoning rather strained and circuitous. It imports into the F. C. & S. clause an additional term, solely by way of the war risk endorsement which, by its terms, covers only those risks already excluded by the F. C. & S. warranty. Moreover, the argument overlooks a significant

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[17] This was the approach adopted by the district court (R. 93-94) in finding that the United States was the insurer of the collision liability of petitioner. As already remarked, this question was not reached by the court below since it found that the collision was not a risk assumed by the Government.

[18] The last sentence of the F. C. & S. clause provides:

> If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

word in the last sentence to the F. C. & S. clause, the so-called "subordination clause." That word is "only." The sentence states that any war risk endorsement "shall supersede the above warranty *only* to the extent that their terms are inconsistent and *only* while such war risk endorsement remains in force." (Emphasis supplied). This sentence, far from being a "subordination clause," would seem to be an "anti-subordination clause," designed to limit the extent to which the F. C. & S. warranty can be subordinated or affected by any subsequent endorsement; its apparent purpose was to make the F. C. & S. clause stand independently of later policy provisions. It seems probable that this sentence was inserted in view of certain canons of construction, which require that a policy be construed against the insurer and which give wider effect to words whereby the underwriter assumes risk than to words excluding risks from coverage. Thus, we think that there is no foundation for the argument that anything in the last sentence of the F. C. & S. clause is intended to import any part of a subsequent war risk endorsement into the F. C. & S. clause.

Nor does that endorsement purport to supersede or alter the language of the F. C. & S. clause in any respect. To the contrary, it expressly adopts *in toto* the language of the clause as it stands and constitutes an agreement that the Government as underwriter shall be liable only for those risks ex-

cluded by the precise unaltered language of the F. C. & S. clause. Moreover, the parenthetical phrase "including the collision clause" appearing in the war risk endorsement merely serves to identify the policy from which the risks to be borne by the Government were to be excluded. In *The Second Warilda* there was a theory that certain language in the charter party contemplated a policy not containing a collision clause at all. [1926] A. C. at 175, 180, 185. As we have seen, this theory was rejected and it was assumed by the House of Lords that the hypothesized policy contained a collision clause but that, despite this fact, the Crown had not assumed collision liability. It seems probable, therefore, that the phrase under discussion was inserted to avoid the possibility of any such theory being raised here. The parenthetical phrase seeks to avoid confusion by expressly *stating* what was *assumed* to be the fact in *The Second Warilda*.[19]

We submit, therefore, that there are no language

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[19] Thus, it is not necessary, as argued by petitioner (Br. 55), to reach the result for which it contends in order to give the parenthetical phrase any effect. Furthermore, there might possibly be collision liabilities which are consequences of hostilities. If, for example, a collision resulted from a decision to display misleading lights to an approaching vessel thought to be an enemy, a very close question would be presented. Such a willful act might well be tortious even though unquestionably a war operation and the resultant liability a consequence of that hostile act. In such a case, it would be open to the vessel's owner to argue that the war risk assumption, including the parenthetical phrase, evidenced an intention to afford coverage against such a liability, despite the fact that the running-down clause is not an integral part of a marine insurance policy.

differences in the contracts involved here and in *The Second Warilda* which would justify any difference in result. Nor do we think a different result was intended. We find it difficult to believe that it was intended to avoid the result of the *Second Warilda* by placing an innocuous parenthetical phrase in the clause describing the policy defining the total risk to be divided between war and marine underwriters, and yet omitting all reference to the running-down clause in the vital exclusory language of the F. C. & S. warranty which defined the risks to be assumed.

Even if petitioner's argument be accepted, that argument merely avoids the impact of the second ground of the decision in *The Second Warilda*, not the basic ground of the decision. As we have seen, the primary basis of the decision was an inquiry along the lines of legal causation. The Crown was held not to have assumed, as war risk insurer, the collision liability since such liability was the proximate consequence of negligence. Petitioner's argument does not meet this holding, a holding which is entirely consistent with the principles laid down by this Court in *General Mutual Ins. Co.* v. *Sherwood, supra*, and which in reality is but a reaffirmation of the American rule as stated in the cases cited in Point I of this brief, the rule that surrounding circumstances of war are not enough to establish loss through a war risk.

It should finally be noted that the Government

can, in no event, be held liable for petitioner's expense in prosecuting this claim. By the express words of the collision clause, *infra*, pp. 52-53, the Government is to assume only the costs of those proceedings which resist the imposition of collision liability or which endeavor to limit such liability. Here the collision liabilities were disposed of by settlement and agreement of the parties (R. 68-70), and petitioner did not resist the imposition of collision liability. This litigation has been almost solely concerned with the enforcement of certain asserted claims upon the policy in suit, arising from the agreed imposition of collision liability.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the district court should be reversed, and that the judgment below should be affirmed.

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OCTOBER 1950.

APPENDIX A

Clause 20 of the time charter entered into between petitioner and the United States provides in pertinent part (R. 80-81):

> Clause 20. Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, which shall include malicious damage, sabotage, strikes, riots and civil commotion, insured for and valued at the amount set forth in Part I which insurance shall be made payable to the persons entitled thereto;
>
> * * * * *
>
> Except as to risks or liabilities assumed, insured or indemnified against by the Charterer pursuant to this Charter, unless otherwise agreed, the Owner shall assume or insure against all other risks or liabilities of whatever nature including without limitation those of a Marine Hull and P. and I. nature and such Hull and P. and I. coverage shall also protect the interests of the Charterer to the extent of the liability it would have if it were the owner of the Vessel.

APPENDIX B

The war risk binder of insurance issued by the United States to petitioner contains, among others, the following provisions (R. 81-82):

> War Risks Binder—R. C. No. 401—Covering Vessels Requisitioned by the War Shipping Administration Division of Wartime Insurance, Washington, D. C.
>
> The War Shipping Administration hereby insures against War Risks Only the risks as listed in schedule below:
>
> Assured: Standard Oil Company of New Jersey.
>
> Address: 30 Rockefeller Plaza, New York, New York.
>
> Vessel: John Worthington. Flag: U. S.
>
> From: Time of delivery to War Shipping Administration about April 22, 1942.
>
> To: Termination of charter.
>
> 1. Hull.,
>
> DWT 12475 Speed 10.8 Knots Date Built 1920 Value $935,625.
>
> Amount $935,625.
>
> * * * * *
>
> SCHEDULE A
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> * * * * *
>
> 3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. * * *
>
> * * * * *

Endorsement No. 1 to be attached to Binder No. R. C. 401 Issued Standard Oil Company of New Jersey by the War Shipping Administration.

It is warranted that

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2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition charter party relative to this vessel accepted by the assured and any modifications or amendments thereto.

APPENDIX C

The collision clause of the standard marine and war risk policy of War Shipping Administration provides (R. 71-72):

Full collision—Sister-ship collision. And it is further agreed that if the Vessel hereby insured shall come into collision with any other ship or vessel and the Owners or Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Assurers will pay the Owners or Charterers such proportion of such sum or sums so paid as the Assurers' subscription hereto bears to the value of the Vessel hereby insured, provided always that their liability

in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, the Assurers will also pay a like proportion of the costs which the Owners or Charterers shall thereby incur, or be compelled to pay; * * *

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